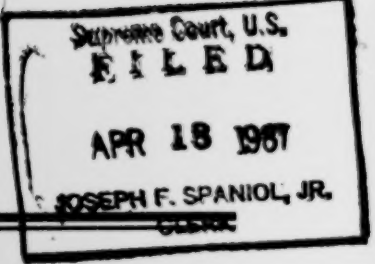


86 1673



No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JAMES D. ST. CLAIR, P.C.*
THOMAS N. O'CONNOR
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for Petitioner
Christopher Gregory*

* Counsel of Record

April 16, 1987



QUESTIONS PRESENTED

1. Whether claim preclusive effect must be given to a prior state court judgment under 28 U.S.C. § 1738, thereby barring a subsequent federal action under 42 U.S.C. § 1983, where the procurement and entry of the judgment itself are essential elements of the § 1983 claim alleging violations of the Due Process Clause of the United States Constitution.

2. Whether the United States Fifth Circuit Court of Appeals erred by giving claim preclusive effect to a prior state court judgment under 28 U.S.C. § 1738, where the state court proceedings were devoid of quality, effectiveness and fairness and the Petitioner was not afforded a full or fair opportunity to litigate his claims in the state court.

3. Whether there is a split between the United States Fifth Circuit Court of Appeals and the United States Tenth and Seventh Circuit Courts of Appeals in their respective applications of claim preclusion and of 28 U.S.C. § 1738 to subsequent actions brought under 42 U.S.C. § 1983 which warrants resolution by this Court.

PARTIES IN THE COURT OF APPEALS

The parties in the Fifth Circuit Court of Appeals were the Petitioner, Christopher Gregory, and the respondents, Thomas J. Drury, Bruno R. Goldapp, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth Oden, Mark White as Attorney General of the State of Texas, and The Alice National Bank.

Pursuant to Petitioner's Motion for Leave to File a Second Amended Complaint, which was never acted on by the United States District Court for the Southern District of Texas, Petitioner sought to update his Amended Complaint by naming as defendants the then current members of the John G. and Marie Stella Kenedy Memorial Foundation, Rene H. Gracida, Lee H. Lytton, Jr., E. B. Groner, Daniel Meaney and Sister Bernard Marie Borgmeyer, by substituting the then current Attorney General of the State of Texas, Jim Mattox, and retaining The Alice National Bank, Kenneth Oden and Thomas J. Drury as defendants.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THE COURT OF APPEALS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	3
Preliminary Statement	3
The Prior Texas State Court Proceedings	5
The Federal Lawsuit	12
REASONS FOR GRANTING THE WRIT	15
I. The Writ Should Be Granted Because This Case Presents An Important Legal Issue Of First Impression	15
II. The Writ Should Be Granted To Resolve A Split Between The Federal Circuit Courts Of Appeals..	17
III. The Writ Should Be Granted Because This Case Is Of Great Public Interest	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES:	Page
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980)	17, 21
<i>Auster Oil & Gas, Inc. v. Stream</i> , 764 F.2d 381 (5th Cir. 1986)	3 n.2
<i>Battieste v. Baton Rouge</i> , 732 F.2d 439 (5th Cir. 1984)	16
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	23
<i>Boileau v. Bethlehem Steel Corp.</i> , 730 F.2d 929 (3rd Cir.), cert. denied, 469 U.S. 871 (1984)	18-19, 21
<i>Burnaman v. Heaton</i> , 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951)	11, 12, 13, 20
<i>Castorr v. Brundage</i> , 459 U.S. 928 (1982)	21
<i>Downton v. Vandemark</i> , 571 F. Supp. 40 (N.D. Ohio 1983)	16
<i>Ex Parte Virginia</i> , 100 U.S. 339 (1880)	3
<i>Greater Houston Bank v. Conte</i> , 666 S.W.2d 296 (Tex. Civ. App.—Houston 1984)	16
<i>Gregory v. Lytton</i> , 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, writ ref. n.r.e.)	10, 12
<i>Gregory v. White</i> , 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, writ ref. n.r.e.), cert. denied, 452 U.S. 439 (1981)	11, 12, 13
<i>Haring v. Prorise</i> , 462 U.S. 306 (1983)	17, 21
<i>Jones v. City of Alton</i> , 757 F.2d 878 (7th Cir. 1985)	18, 21
<i>Kennedy v. Hyde</i> , 682 S.W.2d 525 (Tex. 1984)	11 n.10
<i>Kremer v. Chemical Constr. Corp.</i> , 456 U.S. 461 (1982)	21
<i>Lawlor v. National Screen Service Corp.</i> , 349 U.S. 322 (1955)	15
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	23
<i>McWilliams v. McWilliams</i> , 804 F.2d 1400 (5th Cir. 1986)	17, 18, 19
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972)	3, 17
<i>Morgan v. City of Rawlins</i> , 792 F.2d 975 (10th Cir. 1986)	18, 19
<i>Montana v. United States</i> , 440 U.S. 147 (1979)	21
<i>Norco Construction, Inc. v. King County</i> , 801 F.2d 1143 (9th Cir. 1986)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Scroggins v. Kansas, Dept. of Human Resources, Div. of CETA</i> , 802 F.2d 1289 (10th Cir. 1986)	18, 19, 20, 21
<i>Suburban Trails, Inc. v. New Jersey Transit Corp.</i> , 800 F.2d 361 (3rd Cir. 1986)	16
<i>Texas Employers' Ins. Assoc. v. Tobias</i> , 669 S.W.2d 742 (Tex. Civ. App.—San Antonio 1983, writ. ref. n.r.e.)	16
<i>Thournir v. Meyer</i> , 803 F.2d 1093 (10th Cir. 1986) ..	18, 19
<i>Tower v. Glover</i> , 467 U.S. 914 (1984)	15, 17
<i>Williamson County Regional Planning Commission v. Hamilton Bank</i> , 473 U.S. 172 (1985)	16
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Fifth Amendment	4
U.S. Constitution, Fourteenth Amendment	4
STATUTES AND RULES:	
28 U.S.C. § 1738	4, 14, 15, 17, 18, 21
42 U.S.C. § 1983	3, 4, 14, 15, 16, 17, 18, 21, 23
Fed. R. Civ. P. 12	3 n.2, 13, 22
Fed. R. Civ. P. 56	22
Tex. R. Civ. P. 216	10 n.8
OTHER AUTHORITIES:	
<i>Smith, Full, Faith and Credit and Section 1983: A Reappraisal</i> , 63 N.C.L. Rev. 59 (1984)	19
<i>National Catholic Reporter</i> , Vol. 23, No. 15, Feb. 6, 1987, p. 1, col. 1	3 n.2, 23
<i>National Catholic Reporter</i> , Vol. 23, No. 16, Feb. 13, 1987, p. 7, col. 1	3 n.2, 23
<i>National Catholic Reporter</i> , Vol. 23, No. 18, Feb. 20, 1987, p. 7, col. 1	3 n.2, 23
<i>National Catholic Reporter</i> , Vol. 23, No. 18, Feb. 20, 1987, p. 12, col. 1	23
<i>South Texas Catholic</i> , Oct. 17, 1986, Special Supplement, p. 1, col. 1	22
<i>Wall Street Journal</i> , Oct. 8, 1986, p. 1, col. 1 ...	3 n.2, 6 n.3, 22
<i>Wall Street Journal</i> , Oct. 9, 1986, p. 1, col. 1	3 n.2, 22



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No.

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Christopher Gregory petitions that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1987, is not yet officially reported and is reprinted in Appendix A.¹

The unreported judgment of the United States District Court for the Southern District of Texas, entered on

¹ The Appendices will be cited herein as, for example, "App. G-1a". The letter designates the particular Appendix and the number refers to the particular page(s) of the Appendices.

January 24, 1986, was without opinion and is reprinted in Appendix B.

This Court's denial of a petition for writ of *certiorari* from a judgment of the Supreme Court of Texas in the prior state court action is reported at 452 U.S. 939 (1981). The judgment of the Court of Civil Appeals of Texas in the prior state court action is reported at 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, *writ ref. n.r.e.*), and is reprinted in Appendix C. The final judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on November 28, 1979, was unreported and is reprinted in Appendix D. The interlocutory judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on September 1, 1964, was unreported and is reprinted in Appendix E.

A related opinion of the Texas Court of Civil Appeals rendered on November 1, 1967, is reported at 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, *writ ref. n.r.e.*), and is reprinted in Appendix F.

The Petitioner's Amended Complaint is reprinted in Appendix G.

The affidavit of Reverend José Aldunate Lyon, submitted by Petitioner in opposition to the motions to dismiss in the United States District Court for the Southern District of Texas is reprinted in Appendix H. The affidavits of Marshall Boykin, III, and William R. Joyce, Jr., submitted by Petitioner in opposition to the motions to dismiss are reprinted in Appendices I and J, respectively.

JURISDICTION

This Court has jurisdiction to review the final decision of the Fifth Circuit Court of Appeals entered on January 27, 1987 under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution, the relevant portions of which are reprinted in Appendix K.

The statutes principally involved in the decision of the Fifth Circuit Court of Appeals are 42 U.S.C. § 1983 and 28 U.S.C. § 1783, the relevant portions of which are reprinted in Appendix L.

Rule 216 of the Texas Rules of Civil Procedure is reprinted in Appendix M.

STATEMENT OF THE CASE²

Preliminary Statement

Congress enacted 42 U.S.C. § 1983 "to interpose the federal courts between the States and the people, as guardians of the people's federal rights, to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added) (quoting from *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). It would therefore be anomalous and emasculate the very purposes of § 1983 if depriva-

² The allegations of Gregory's Amended Complaint (App. G-65a-76a) are assumed as true, and all inferences drawn in his favor, because the Fifth Circuit Court of Appeals affirmed the Southern District of Texas' dismissal pursuant to Fed. R. Civ. P. 12(b). *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1986). Moreover, the truth of Gregory's allegations (however remarkable they may seem at first blush) is substantiated in a number of investigative reports published both in the *Wall Street Journal* and in the *National Catholic Reporter*. *Wall St. Journal*, Oct. 8, 1986, p. 1, col. 1; Oct. 9, 1986, p. 1, col. 1. *National Catholic Reporter*, Feb. 6, 1987, Vol. 23, No. 15, p. 1, col. 1; Feb. 13, 1987, Vol. 23, No. 16, p. 7, col. 1; Feb. 20, 1987, Vol. 23, No. 18, p. 7, col. 1.

tions of fundamental Constitutional rights were insulated from challenge in the federal courts merely because the deprivation is accomplished in part by obtaining a state court judgment subject to the full, faith and credit statute, 28 U.S.C. § 1738. Yet, that is precisely what happened in this case.

The Petitioner, Christopher Gregory ("Gregory"), was denied a trial on the merits and a full or fair opportunity to litigate his claims in the prior state court action. The respondents deprived Gregory of his Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution by causing the Texas courts to enter an invalid settlement agreement as a court-ordered consent judgment binding on Gregory, notwithstanding Gregory's lack of consent and vehement objections to the alleged settlement. Once the respondents procured that judgment wrongfully, Texas law precluded Gregory from challenging its validity. Thus, Gregory turned to the federal courts seeking remedies under § 1983 for the deprivations of his Constitutional rights caused by the respondents' unlawful actions.

The United States District Court for the Southern District of Texas and the United States Fifth Circuit Court of Appeals, however, abdicated their role as guardians of federal rights by boot-strapping the very judgment which in part caused the Constitutional deprivation into an absolute bar to Gregory's federal claims under 28 U.S.C. § 1738. By its decision, the Fifth Circuit Court of Appeals sent a clear message to those, like respondents, bent upon abrogating the Constitutional rights of others—obtain a state court's imprimatur by whatever means and the deprivation of Constitutional rights will never thereafter be subject to challenge in the federal courts. Neither 28 U.S.C. § 1738, nor equitable state doctrines of claim preclusion, mandate such a patently unfair and perverse result.

The Prior Texas State Court Proceedings

Although the prior Texas suit was based on allegations of undue influence against Gregory, in reality it involved a fight for control of the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation").

The Foundation was established on January 22, 1960, by a wealthy and deeply religious South Texas widow, Sarita Kenedy East, for the purpose of assisting the poor and underprivileged primarily in South America. Sarita East simultaneously executed a new will leaving the residue of her estate to the Foundation. She also named herself as the Foundation's sole member and director.

In February, 1960, Mrs. East was advised by her local attorney, Jacob Floyd ("Floyd"), that she should appoint additional members to the Foundation. Consequently, she appointed Floyd and one of her relatives and a Texas District Court Judge, respondent, Lee H. Lytton, Jr. ("Lytton"). However, Mrs. East discovered shortly thereafter that Floyd's advice was erroneous. She therefore requested, and obtained, the voluntary resignations of Floyd and Lytton on June 16, 1960.

On December 30, 1960, Sarita East executed a third codicil to her 1960 will, appointing Gregory her successor as the Foundation's sole member and director upon her death. As a member of the Order of Cistercians of the Strict Observance, also known as the Trappists, Gregory had become acquainted with Sarita East some thirteen (13) years previously and had worked closely with her establishing Trappist monasteries in North and South America. It was because of one such South American trip with Gregory that Sarita East decided to form the Foundation and dedicate its resources to the poor in South America.

Sarita East died on February 11, 1961 and her will was admitted to probate on March 11, 1961. Gregory

thus became the Foundation's sole member and director, a situation which the respondents found intolerable.

On April 19, 1961, at the urging of the Bishop of Corpus Christi, Lytton, represented by and later joined by Floyd, commenced an action in the 79th Judicial District Court of Jim Wells County, Texas, seeking removal of Gregory from the Foundation based on the false allegation that Gregory had procured the prior resignations of Lytton and Floyd by unduly influencing Sarita East. Judge Lytton also obtained *ex parte* an injunction restraining Gregory from exercising any control over the Foundation. Lytton, however, never intended to prosecute the case; it was simply the mechanism to force Gregory's resignation and to replace him with Lytton and Floyd.³ The Bishop of Corpus Christi and others intervened, each claiming an interest in the Foundation or its funds.

The undue influence allegations of Judge Lytton's lawsuit, however, unexpectedly jeopardized the Foundation's very existence. In 1962, based on those same undue influence allegations, remote heirs of Sarita East commenced actions in the Nueces County District Court, Texas, seeking to invalidate her 1960 will and prevent the residue of her estate from passing to the Foundation. By defending the 1960 will and the Foundation against the heirs' challenges, the respondents were placed in the difficult legal quandry of simultaneously asserting diametrically opposed positions in two different Texas courts. Their solution was to quietly settle Judge Lytton's suit lest it prove the instrument destroying the Foundation, while simultaneously assuming control of the Foundation by ousting Gregory.

³ Judge Lytton recently admitted to the *Wall Street Journal* that the true purpose behind his lawsuit was to ensure that the Foundation funds stayed in Texas under the control of Texans. *Wall Street Journal*, Oct. 8, 1986, p. 30, col. 2.

The respondents thus prepared for Gregory's signature a purported "settlement agreement" in the form of a consent judgment, his resignation from the Foundation and a naked power of attorney. The documents, however, presented no settlement because they required Gregory's complete abdication from the Foundation. Moreover, the alleged settlement agreement abrogated the will of Sarita East by requiring Foundation grants to be made within the State of Texas instead of to the poor in South America (App. E-43a), a requirement imposed to satisfy the Texas Attorney General.⁴ Gregory refused to sign the documents.

Unable to obtain Gregory's signature through their own devices, the respondents used Gregory's religious status and enlisted the aid of his religious superiors to coerce him into accepting their proposed "settlement". Gregory was sent to a monastery in Chile and ordered to sign the documents under repeated threats of dismissal from the Trappists and excommunication from the Catholic Church if he refused. Formal canonical warnings were threatened; at least one issued. In September, 1963, under extreme duress and torn between his duties of conscience to Mrs. East and obedience to his superiors, Gregory, on the advice of a distinguished Catholic prelate, signed the settlement agreement conditionally, but refused to execute the resignation or power of attorney. (App. H-77a-78a). The conditional nature of Gregory's signature was set forth in his cover letter addressed to the Holy See in which he reconciled his two conflicting religious duties (conscience versus obedience) by conditioning his assent on the Holy See taking full responsibility in writing for changing the will of Sarita East. (*Id.*).

⁴ The Texas Attorney General was made a party because the Foundation was a charitable organization established under the Texas Non-Profit Corporation Act. (App. E-31a).

The signed settlement agreement and Gregory's cover letter never reached the Holy See. They were intercepted by the Apostolic Visitor appointed by the Catholic Church to settle Judge Lytton's suit. He removed the cover letter and sent what thus appeared to be an unconditionally signed settlement agreement to the respondents in Texas. These actions were kept secret from Gregory and his counsel.⁵

By October, 1963, all other parties to the Lytton suit, including the Texas Attorney General, had signed the settlement agreement. However, the Foundation's Articles of Incorporation had to be amended to make the settlement effective. That action, in turn, required Gregory's assent because he had never resigned from the Foundation. In January, 1964, Gregory was summoned to a meeting in Miami, Florida attended by Floyd's law partner, Kenneth Oden ("Oden"), and Texas attorney Robert Jewett ("Jewett"), who represented various parties in the Lytton suit. There, Gregory was ordered to resign from the Foundation and execute a naked power of attorney. Gregory again refused, orally revoked his prior conditional assent to the settlement and forbade Jewett from representing his interests in any way in the Lytton litigation.

In reprisal, Gregory was sent to a monastery in the remote regions of Northern Canada and placed under virtual house arrest. He was forbidden from speaking with anyone about the Foundation or the litigation, including his counsel, under threat of excommunication *ipso facto*.⁶

⁵ Gregory had retained his own lawyer, William R. Joyce, Esq., of Washington, D.C., in November, 1961. (App. J-87a).

⁶ The clear and unequivocal threat came from Gregory's Abbot in a July, 1964 letter (emphasis added):

I therefore want to make it perfectly clear to you that I would consider, as a serious violation of your precept, communicating

Unable to coerce Gregory's resignation or power of attorney, the respondents turned to Gregory's Abbot, Dom Thomas Keating ("Keating"). On August 31, 1964, they extracted from Keating an unsigned, unverified telegram purporting to authorize Jewett (not Gregory's attorney) to take all actions necessary in Gregory's behalf to finalize the settlement.

Armed with Keating's telegram, and purporting to use it as Gregory's "proxy", on September 1, 1964, Jewett (1) convened a special meeting of the Foundation; (2) amended the Foundation's Articles of Incorporation; (3) elected Lytton, the Bishop of Corpus Christi, Oden, and others (all local Texans) as the Foundation's new members; and (4) tendered Gregory's resignation. (App. J-91a-97a).⁷

That same day, Jewett presented the settlement agreement to the Jim Wells County District Court as *fait accompli*, misrepresented that all parties had agreed to it and requested its entry as a judgment of the court. The Texas District Court incorporated the settlement

with anyone regarding the KMF [i.e. the Foundation] without my written permission. Any absence for the sake of the KMF, without permission, would bring with it *another canonical warning and excommunication as a fugitive ipso facto*.

⁷ This meeting was a charade and a farce. Jewett, purporting to act as Gregory's "attorney-in-fact", was at the meeting. The Bishop, Lytton, Oden, Bruno Goldapp and Elena Kenedy also were present, although none was a member of the Foundation. Jewett conveniently avoided the obstacle of having to give Gregory the required notice by purporting to waive notice on Gregory's behalf. Jewett, acting for Gregory, then elected the Bishop, Lytton, Oden and the others as the Foundation's new members. The amendments to the Foundation's Articles of Incorporation were approved. Jewett also tendered Gregory's resignation. Thus, by using Keating's telegram, Jewett and the respondents were able to oust Gregory, settle the Lytton suit, alter the will of Mrs. East and gain control of the Foundation; all contrary to Gregory's wishes and without notice to Gregory or his counsel. (App. J-91a-97a).

agreement verbatim into a judgment, but made the judgment interlocutory pending the outcome of the ongoing will contest in Nueces County. (App. E-31a-54a). The respondents intentionally concealed from the court Gregory's objections and lack of consent before the settlement agreement was entered as a court-ordered interlocutory judgment. Unbeknownst to Gregory at the time, once the respondents slipped the settlement agreement past the Texas District Court and obtained the judgment, Gregory would thereafter be denied any procedural or substantive remedy under Texas law.

In March, 1966, after Gregory independently learned of the interlocutory judgment, he brought a separate action by way of Bill of Review in the Texas District Court challenging the judgment as invalid. However, the Bill of Review was dismissed as premature because, under Texas law, the interlocutory judgment was not subject to review. *Gregory v. Lytton*, 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, writ ref. n.r.e.). (App. F).

The interlocutory judgment and the Foundation lay dormant for approximately twelve (12) years while the respondents defended the will contest. On July 24, 1978, after Sarita East's 1960 will finally was upheld, the Texas Attorney General filed a motion seeking to convert the interlocutory judgment into a final judgment without a trial. Gregory responded by filing an amended motion to set aside the interlocutory judgment and timely requested a trial by jury.⁸ A hearing ultimately was scheduled for September 21, 1979. (App. I-79a-80a).

Because a trial by jury was properly requested, Gregory and his counsel were taken by complete surprise when the

⁸ The Texas Rules of Civil Procedure provide that a trial by jury may be requested at any time up to ten (10) days before the date set for trial. Tex. R. Civ. P. 216. (App. M-106a). No trial date having been set by the District Court, Gregory's request for a trial by jury was timely under Texas law.

respondents appeared with witnesses and documents and began introducing evidence at the hearing. (App. I-80a). During the very short hearing (only a total of 94 pages of transcript), Gregory's repeated objections to the District Court receiving evidence on the substantive issues were routinely denied. (*Id.* ¶ 5). Faced with no alternative, and totally unprepared, Gregory was the only witness to testify on his behalf. (*Id.*).⁹ The interlocutory judgment was converted into a final judgment on November 28, 1979. (App. D-21a-30a).

Although the record developed by the respondents in the Texas District Court was limited and one-sided, Gregory appealed to the Texas Court of Civil Appeals. Relying on the well-established rule in *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951), Gregory argued that the final judgment should not have entered and no evidence on the substantive issues should have been admitted because he had previously notified the court of his lack of consent and had properly requested a trial.¹⁰

The Texas Court of Civil Appeals, however, avoided Gregory's arguments by *sua sponte* making new law and retroactively applying the new rule to Gregory's case. *Gregory v. White*, 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, *writ ref. n.r.e.*), *cert. denied*, 452 U.S. 439 (1981). (App. C-15a-20a). The appellate court

⁹ Had Gregory been afforded the opportunity to present his case, he could have called numerous witnesses and introduced voluminous documents exposing the respondents' scheme, as described in the *Wall Street Journal* and *National Catholic Reporter* articles. See p. 3, *supra*, at n.2.

¹⁰ In *Burnaman*, the Texas Supreme Court held that a valid consent judgment cannot be rendered if one of the parties withdraws his consent any time prior to entry of judgment and, if requested, a trial must be held on the validity of the objecting party's consent. *Id.*; 150 Tex. at 339, 240 S.W.2d at 291. See *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984) (*Burnaman* rule requires continued consent of all parties at the moment judgment enters).

shifted the timing of *Burnaman's* application, holding that its requirements must be satisfied before entry of an interlocutory consent judgment and were inapplicable after entry of an interlocutory judgment but before conversion into a final judgment. *Id.* at 403-404. (App. C-17a). This new rule of Texas law, announced and applied for the first time at the appellate level, thus placed Gregory into the jaws of a legal "Catch 22" and deprived him of any remedies under Texas law because, after the respondents caused the Texas District Court to incorporate the invalid settlement agreement into the interlocutory judgment in 1964, any subsequent challenge was either too early, *Gregory v. Lytton, supra*, 422 S.W.2d 586 (App. F-55a-64a), or too late, *Gregory v. White, supra*, 604 S.W.2d 402 (App. C-15a-20a).¹¹ Gregory's arguments that entry of the final judgment in 1979 without a trial contravened *Burnaman* and thus violated Due Process were ignored by the majority of the Texas appellate court. *See id.*, 604 S.W.2d at 404-405 (Cadena, Chief Justice, dissenting) (App. C-19a-20a).

On November 26, 1980, the Texas Supreme Court refused Gregory's petition for a writ of error, thereby making final and binding the invalid settlement agreement ousting Gregory from the Foundation. On June 15, 1981, this Court denied Gregory's petition for a writ of *certiorari*. 452 U.S. 939 (1981).

The Federal Lawsuit

On September 21, 1981, Gregory filed this action in the Texas Federal District Court¹² alleging, *inter alia*, that the respondents conspired under color of state law

¹¹ It was of course impossible for Gregory to voice his objections before entry of the interlocutory judgment because the respondents intentionally prevented Gregory and his counsel from being present at the 1964 hearing for that very reason.

¹² The case initially was filed in the Western District of Texas, but was transferred to the Southern District of Texas on respondents' motion.

to deprive Gregory of his Due Process rights in violation of 42 U.S.C. § 1983. (App. G-65a-76a). In contrast to Gregory's appellate arguments in the Texas courts that he was deprived of his rights under *Burnaman* before entry of final judgment in 1979, Gregory's federal complaint focused on the respondents' unlawful actions before and at the time the 1964 interlocutory judgment entered. (App. G-67a-71a). Those actions, in combination with the retroactive application of the new Texas law announced at the appellate level in *Gregory v. White, supra* (App. C-15a-20a), deprived Gregory of his federally protected rights to a meaningful opportunity to be heard in violation of the Due Process Clause and 42 U.S.C. § 1983.

The respondents moved to dismiss under Fed. R. Civ. P. 12(b), raising the affirmative defense that the prior Texas judgment precluded Gregory's federal suit as a matter of law. Approximately four (4) years after the complaint was filed, and without the benefit of any discovery (it having been stayed from the outset upon respondents' motion), the District Court held an informal conference in chambers on January 9, 1986, at the conclusion of which the motions to dismiss were summarily granted without opinion. A formal judgment prepared by the respondents dismissing the case was entered by the District Court on January 24, 1985. (App. B-12a-14a).

On appeal, the Fifth Circuit affirmed the District Court's dismissal on the ground of claim preclusion. (App. A-1a-11a). The Fifth Circuit held that it was prevented by the full, faith and credit statute from considering whether Gregory was deprived of a full or fair opportunity to be heard, "regardless of our view of . . . its constitutional sufficiency [*i.e.*, the 1979 hearing]" (App. A-8a), apparently because "[n]othing suggest[ed] that the *appellate review* of the rejection of Brother Leo's motion to set aside was constitutionally suspect, whether or not one agrees with the rulings." (App. A-11a) (*emphasis added*).

The Fifth Circuit did not explain how further appellate review in the Texas Supreme Court after Texas law was changed and retroactively applied in *Gregory v. White* afforded Gregory the Due Process required under the United States Constitution. Nor did the Fifth Circuit consider whether Gregory's federal claims arose after and as result of the entry of the Texas judgment, thereby rendering claim preclusion inapplicable because the procurement and entry of the judgment itself were essential elements of Gregory's § 1983 claim. The Fifth Circuit also did not look behind the prior judgment to examine the quality, effectiveness or fairness of the state court proceedings or determine whether Gregory had a full and fair opportunity to litigate his claims before judgment entered in state court. The Fifth Circuit brushed aside all such considerations stating, incorrectly: "We do not here face the issue of the preclusive effect under state law of a state court judgment flawed by a systemic failure of constitutional dimensions." (App. A-11a).

This case, however, presents precisely the issue of whether a state court judgment flawed by systemic failures of Constitutional dimensions must be given claim preclusive effect under 28 U.S.C. § 1738. The Due Process Clause of the United States Constitution requires that Gregory be afforded at least *one* full and fair opportunity to litigate his claims. To date, he has never had his day in any court; state or federal. Under these unique circumstances, neither 28 U.S.C. § 1738 nor the equitable doctrine of preclusion bar Gregory from asserting later-arising federal claims and seeking vindication of his Constitutional rights in the federal courts under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because This Case Presents An Important Legal Issue of First Impression

This Court has never decided whether a prior state court judgment which is an essential element of a litigant's § 1983 claim must be given claim preclusive effect under 28 U.S.C. § 1738. However, in *Tower v. Glover*, 467 U.S. 914 (1984) this Court suggested that claim preclusion does not apply (but issue preclusion may) where the Constitutional deprivation is accomplished, at least in part, through the wrongful procurement of a state court judgment.

In *Tower*, the petitioner filed a § 1983 suit alleging that his prior state court conviction had been procured pursuant to conspiracy between his attorneys and various state officials. After holding public defenders not absolutely immune from § 1983 liability, this Court remanded the case for consideration only of whether issue preclusion may be applicable. *Id.* at 923-924. The doctrine of claim preclusion was never considered or mentioned in the opinion, nor was the petitioner's complaint summarily dismissed. The *Tower* decision thus suggests that where, as here, the prior judgment is itself an integral element of the § 1983 claim, that judgment presents no absolute barrier to the later assertion of the federal cause of action in federal court.

Not giving claim preclusive effect to a prior state court judgment constituting part of the factual matrix comprising a § 1983 claim flows logically and legally from basic principles underlying claim preclusion. As this Court recognized in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955), a prior judgment "cannot be given the effect of extinguishing claims which did not even exist and which could not possibly have been sued upon in the previous case." Here, Gregory's federal § 1983 claims did not mature until *after* the Texas judg-

ment became final. See, e.g., *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146-1147 (9th Cir. 1986) (§ 1983 claim based on deprivation of Due Process does not accrue until relevant governmental authorities make a final decision depriving litigant of Due Process); *Battieste v. Baton Rouge*, 732 F.2d 439, 440 (5th Cir. (1984) (District Court determined that § 1983 action did not arise until conviction was final); *Downton v. Vandemark*, 571 F. Supp. 40, 47 (N.D. Ohio 1983) (§ 1983 claim alleging deprivation of right to effective counsel did not accrue until District Court's judgment was final). Texas law also provides that a prior judgment does not preclude a later-arising claim, even where the subsequent claim relates to the subject matter of the prior action. See, e.g., *Greater Houston Bank v. Conte*, 666 S.W.2d 296, 300 (Tex. Civ. App.—Houston 1984); *Texas Employers' Ins. Assoc. v. Tobias*, 669 S.W.2d 742, 744 (Tex. Civ. App.—San Antonio 1983, writ ref. n.r.e.).

Gregory's § 1983 claims did not exist and could not have been raised prior to entry of the final Texas judgment. Those claims were not a defense to Lytton's false undue influence charges because the settlement agreement had not yet been entered as a judgment of the Court. Moreover, Gregory's federal claims were not ripe for adjudication until after the judgment was made final and binding against Gregory. See, e.g., *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986); *Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F.2d 361 (3rd Cir. 1986).

By giving claim preclusive effect to the prior judgment which comprises part of the federal claim, the Fifth Circuit effectively carved out an unwarranted exception to § 1983. In adopting § 1983, Congress clearly intended the statute's proscriptions to be applicable to all Constitutional deprivations by persons acting under

color of state law, even those accomplished through state judicial proceedings. *Tower v. Glover*, 467 U.S. 914 (1984); *Mitchum v. Foster*, 407 U.S. 225 (1972); see *McWilliams v. McWilliams*, 804 F.2d 1400, 1403 (5th Cir. 1986). Transforming the very judgment which causes the deprivation into an absolute bar unnecessarily exempts the fruits of state judicial action from the reach of § 1983 and emasculates the "grave congressional concern that the state courts have been deficient in protecting federal rights." *Haring v. Prosise*, 462 U.S. 306, 323 (1983) (quoting from *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980)). Neither 28 U.S.C. § 1738, nor principles of claim preclusion mandate the creation of a special class of state action exempt from prosecution under § 1983 merely because the deprivation of Constitutional rights is accomplished in part through entry of a judgment by a state court. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (§ 1983 is a remedy for unconstitutional state action, whether it be executive, legislative or judicial).

The Fifth Circuit Court of Appeals ignored the unusual factual circumstances of this case, the implications of this Court's decision in *Tower*, and the unique federal claims asserted by Gregory. Instead, it focused myopically on the prior state court judgment and mechanically applied principles of claim preclusion without proper analysis of the factual or legal bases for Gregory's later-arising § 1983 cause of action. Accordingly, Gregory respectfully requests that this Court grant *certiorari*, review the Fifth Circuit's erroneous decision and decide the issue of first impression presented by this case.

II. The Writ Should Be Granted To Resolve A Split Between The Federal Circuit Courts of Appeals

In affirming the dismissal of Gregory's federal complaint, the Fifth Circuit refused to examine the gross unfairness, inequalities and inadequacies of the Texas

state court proceedings. Indeed, the Fifth Circuit held such considerations irrelevant:

Whatever the label placed on the proceeding in which Brother Leo's motion to set aside the interlocutory judgment was decided, *and regardless of our view of its constitutional sufficiency*, if we are bound by the state court decisions . . . we must affirm the district court's dismissal.

(App. A-8a) (emphasis added). See *McWilliams v. McWilliams*, 804 F.2d 1400 (5th Cir. 1986) where the Fifth Circuit similarly engaged in rote-like application of claim preclusion doctrines to bar a § 1983 action.

By contrast, the Tenth and Seventh Circuit Courts of Appeals expressly eschew the Fifth Circuit's mechanical approach and instead engage in a more sophisticated and flexible analysis specifically designed to reconcile the potential conflict between Congress' strong policy of remedying deprivations of Constitutional rights under 42 U.S.C. § 1983, and giving full, faith and credit to prior state court judgments under 28 U.S.C. § 1738. In a number of recent decisions, the Tenth Circuit refused to give claim preclusive effect to prior state court judgments in § 1983 cases where it was not clearly established that the plaintiff had a full and fair opportunity to litigate his claims, *Thournir v. Meyer*, 803 F.2d 1093 (10th Cir. 1986); *Scroggins v. Kansas, Dept. of Human Resources, Div. of CETA*, 802 F.2d 1289 (10th Cir. 1986) [hereinafter cited as "*Scroggins*"], or the Court doubted the quality, extensiveness or fairness of the prior state court procedures, *Morgan v. City of Rawlins*, 792 F.2d 975 (10th Cir. 1986). The Seventh Circuit has also held that a prior state court judgment is not entitled to claim preclusive effect where the prior state proceedings did not afford the federal plaintiff the requisite Due Process mandated by the Constitution. *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985). See also *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929 (3rd Cir.), *cert. denied*,

469 U.S. 871 (1984); Smith, *Full, Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59, 106-123 (1984) (where the author advocates persuasively for limited exceptions to claim preclusion under circumstances similar to those presented by this case).

The Fifth Circuit's opinion in this case, and its decision in *McWilliams v. McWilliams*, 804 F.2d 1400 (5th Cir. 1986), cannot be reconciled with the Tenth Circuit's decisions in *Thournir*, *Scroggins* and *Morgan*, or the Seventh Circuit's opinion in *Jones*. Indeed, had Gregory commenced this action in the Tenth or Seventh Circuit, the prior Texas judgment would not have been given claim preclusive effect and Gregory's complaint would not have been dismissed.

Gregory was deprived of a full or fair opportunity to litigate his claims in the Texas state courts on at least five (5) separate occasions. First, when the respondents, knowing of Gregory's lack of consent and his refusal to agree to the settlement, procured Gregory's signature under extreme duress and coercion, caused his conditional cover letter to be separated from the settlement agreement, procured Keating's telegram and then secretly held a meeting of the Foundation at which they ousted Gregory pursuant to a patently invalid "proxy" allegedly given to Jewett (not Gregory's attorney) by Gregory's religious superior. Second, when the respondents purposefully excluded Gregory and his counsel from the 1964 hearing and caused the Texas District Court to enter a settlement agreement they knew to be invalid as a court-ordered interlocutory judgment. Third, when the Texas courts dismissed Gregory's Bill of Review as premature without reaching the merits. Fourth, when the Texas District Court refused Gregory's timely request for a trial and instead unexpectedly held a brief and one-sided evidentiary hearing on September 21, 1979. Fifth, when the Texas Court of Civil Appeals made new law and applied it retroactively to preclude Gregory's

1979 challenge to the court-ordered settlement because he had not voiced his objections before the interlocutory judgment entered in 1964.

Gregory also was not afforded a full or fair opportunity to litigate the Constitutional claims he asserts in this case. First, Gregory's Constitutional claims were not ripe until after the Texas judgment became final (*see* pages 15-16, *supra*). Second, at the time Gregory appealed the entry of the final judgment, Texas law under *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951) clearly provided that a settlement agreement could not be entered as a consent judgment if one of the parties notified the court of his lack of consent before entry of final judgment. It is undisputed that Gregory complied with the requirements of *Burnaman*. The Texas Court of Civil Appeals, however, changed Texas law and whipsawed Gregory with a legal "Catch 22" the effect of which when applied to this case resulted in a holding that, once the respondents unlawfully prevented Gregory from being present at the hearing in 1964, Texas law precluded Gregory from thereafter challenging the judgment. In short, the change in Texas law rendered Gregory's first challenge too early, *Gregory v. Lytton*, *supra* (App. F-55a-64a), and his subsequent challenge too late, *Gregory v. White*, *supra* (App. C-15a-20a), thereby depriving Gregory of any meaningful opportunity to raise his Due Process claims. Where, as here, the state court proceedings place a litigant between Scylla and Charybdis, the resulting judgment is not entitled to claim preclusion. *Scroggins*, *supra*, 802 F.2d 1289, 1292 (10th Cir. 1986).

Moreover, the prior Texas litigation was fundamentally unfair and lacking in quality or extensiveness. At every stage in the Texas proceedings, Gregory was stymied from receiving a full or fair day in court. He was prevented from litigating his defenses to Lytton's false undue influence charges by the respondents procuring his signature on a "settlement agreement" through coercion

and duress, causing Gregory's conditional cover letter to be divorced from the document and then surreptitiously holding a meeting of the Foundation and using a telegram from Gregory's religious superior as Gregory's proxy to confirm the settlement, elect the respondents as new members and tender Gregory's resignation from the Foundation. Subsequently, the respondents purposefully excluded Gregory from the 1964 hearing to ensure that their scheme would not be exposed before judgment entered. The Texas courts then dismissed Gregory's first challenge to the interlocutory judgment as premature and his subsequent challenge to entry of the final judgment as untimely. The inherent unfairness of the entire proceedings mandates that Due Process principles override any preclusive effect which arguably may be ascribed to the resulting judgment under 28 U.S.C. § 1738. See *Scroggins, supra*, 802 F.2d at 1291; *Jones v. City of Alton, supra*, 757 F.2d at 884; *Boileau v. Bethlehem Steel Corp., supra*, 730 F.2d at 935.

The Tenth and Seventh Circuits' flexible claim preclusion analysis is consistent with prior decisions of this Court, whereas the Fifth Circuit's rote application of broad preclusion rules is in direct conflict. This Court has consistently held that state preclusion rules do not bar a plaintiff's § 1983 action where the plaintiff has not had a full and fair opportunity to litigate his claims in state court. *Haring v. Prosise*, 462 U.S. 306, 313-314, 317-318 (1983); *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 (1982). This Court has also held that, even in the face of state law preclusion, reexamination of the issues by a federal court nevertheless is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in the prior action. *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979). See *Castorr v. Brundage*, 459 U.S. 928, 929 n.2 (1982) (the character of the earlier state proceedings and the character of the federal Constitutional claim affect the appli-

cability of claim preclusion in § 1938 actions) (Stevens, J.), *denying cert. to*, 674 F.2d 531 (6th Cir. 1982).

Here, there was a concerted, systemic failure to afford Gregory a full or fair opportunity to litigate either his defenses to Lytton's false charges of undue influence, the validity of the judgment incorporating the invalid settlement agreement or the federal claims raised in this case. Moreover, there exist serious doubts about the quality, extensiveness and fairness of the procedures orchestrated by the respondents in the prior Texas action. At a minimum, Gregory's pleadings raise genuine issues of material fact on the fairness, quality and extensiveness issues which cannot be resolved on a motion to dismiss under Fed. R. Civ. P. 12 or even on a motion for summary judgment under Fed. R. Civ. P. 56.

The Fifth Circuit clearly erred in affirming the District Court's summary dismissal of Gregory's complaint under Fed. R. Civ. P. 12(b). Its opinion and method of analysis is diametrically opposed to recent and better-reasoned decisions of the Tenth and Seventh Circuits and conflicts with prior decisions of this Court. Protections of fundamental Constitutional rights under § 1983 should not turn on such procedural niceties as whether jurisdiction and venue can be acquired in the Tenth or Seventh, rather than the Fifth, Circuit Court of Appeals. Accordingly, this Court should grant *certiorari* to review the Fifth Circuit's error and resolve the split between the Fifth, and Tenth and Seventh, Circuit Courts of Appeals.

III. The Writ Should Be Granted Because This Case Is Of Great Public Interest

This case has peaked the interests of attorneys, businessmen and religious persons. Two lengthy articles on the case appeared in the *Wall Street Journal* on October 8 and 9, 1986. The Bishop of Corpus Christi published a lengthy rejoinder in a special supplement to the October 17, 1986 issue of the *South Texas Catholic*. The *National*

Catholic Reporter published a three part series on the case in its February 6, 13 and 20, 1987 issues.

These articles and the issues raised in this case have stimulated serious debate amongst laymen, religious persons and lawyers. Much of that debate, however, reflects a disturbing lack of confidence that our legal system or the United States Constitution protects citizens against injustices caused by legal technicalities. As stated in an editorial in the February 20, 1987 issue of the *National Catholic Reporter*:

Those who now hold the moneybags say [Gregory] had "his day in court" many times in the past 25 years. The record shows his case was never heard on the merits. When his most recent suit was rejected last month [by the Fifth Circuit], the judgment was based entirely on legal technicalities. That was the law speaking, but it was not speaking about justice—it was speaking about the law. (Vol. 23, No. 18, p. 12, col. 1).

This Court should hear this case to rule definitively on the difficult legal issues over which theologians, laymen, attorneys, and even the Federal Circuit Courts of Appeals, disagree. A uniform rule and method of analysis should be pronounced to avoid unnecessary and counter-productive forum shopping in cases where a prior state court judgment could be raised as a defense to a § 1983 claim. Review is especially important to remedy the perceptions of laymen and religious persons that the state and federal courts can be used by the unscrupulous as instruments of injustice. Gregory respectfully suggests that a thorough and comprehensive review by this Court can and will change those perceptions and re-install confidence that the Due Process Clause "protects civil litigants who seek recourse in the courts," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1952), and guarantees "to all individuals a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

CONCLUSION

For the reasons discussed above, a writ of *certiorari* should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

JAMES D. ST. CLAIR, P.C.*

THOMAS N. O'CONNOR

HALE AND DORR

60 State Street

Boston, MA 02109

(617) 742-9100

Attorneys for Petitioner

Christopher Gregory

* Counsel of Record

April 16, 1987



86 1673⁽²⁾

FILED
APR 18 1987

JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

APPENDICES TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES D. ST. CLAIR, P.C.*

THOMAS N. O'CONNOR

HALE AND DORR

60 State Street

Boston, MA 02109

(617) 742-9100

Attorneys for Petitioner

Christopher Gregory

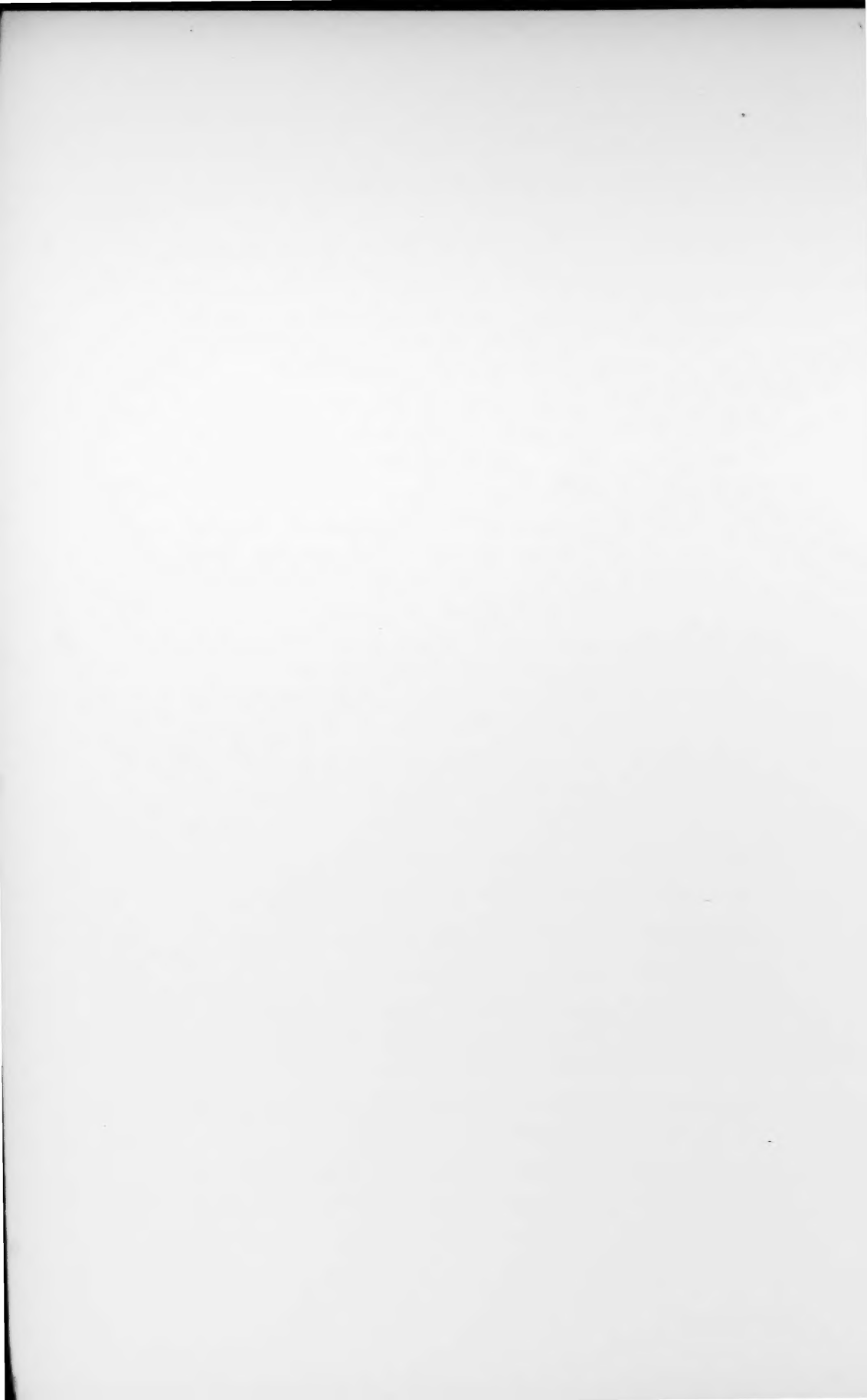
* Counsel of Record

April 16, 1987



TABLE OF CONTENTS

	Page
Appendix A Opinion Of The United States Court Of Appeals For The Fifth Circuit	1a
Appendix B Unreported Final Judgment Entered By The United States District Court For The Southern District Of Texas	12a
Appendix C <i>Gregory v. White</i> , 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, <i>writ ref. n.r.e.</i>), <i>cert. denied</i> , 452 U.S. 939 (1981)	15a
Appendix D Unreported Final Judgment Of The 79th Judicial District Court Of Jim Wells County, Texas, Entered On November 28, 1979	21a
Appendix E Unreported Interlocutory Judgment Of The 79th Judicial District Court Of Jim Wells County, Texas, Entered On September 1, 1964	31a
Appendix F <i>Gregory v. Lytton</i> , 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, <i>writ ref. n.r.e.</i>)	55a
Appendix G The Amended Complaint	65a
Appendix H Affidavit Of José Aldunate Lyon	77a
Appendix I Affidavit Of Marshall Boykin, III	79a
Appendix J Affidavit Of William R. Joyce, Jr.	87a
Appendix K Relevant Portions Of Fifth And Fourteenth Amendments To The United States Constitution	104a
Appendix L Relevant Portions Of 42 U.S.C. § 1983 And 28 U.S.C. § 1738	105a
Appendix M Relevant Portions Of Tex. R. Civ. P. 216	106a



APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2081

CHRISTOPHER GREGORY,
Plaintiff-Appellant,

versus

THOMAS J. DRURY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

(January 27, 1987)

Before CLARK, Chief Judge, WISDOM and HIGGIN-
BOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

We review the dismissal under Rule 12, Fed. R. Civ. P. of a suit by a former Trappist Monk, Christopher Gregory, also known as Brother Leo. The suit named as defendants the Attorney General of the State of Texas, the Alice National Bank and then members of the John G. and Marie Stella Kenedy Memorial Founda-

tion, including, among others, the Bishop of the Diocese of Corpus Christi. The complaint alleged that defendants conspired to deprive Brother Leo of a fair trial in a civil suit contesting control of a Texas foundation, depriving him of rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and secured by a private right of action under Title 42 U.S.C. 1983, as well as his right to a trial by jury under state law.

The full story of this Texas-size will contest would challenge the imagination of even Larry McMurtry and has a cast that rivals his epic Lonesome Dove. But we enter at the very end of this legal saga, the end despite the entry of fresh counsel with ingenious arguments who try to salvage too much, too late, and with too little. We will tell only a small part of the story because as we see the case before us, the controlling issues need little factual flesh to be understood and decided. As we will explain, we are persuaded that the complaint stated no claim, and on that basis we affirm the district court's dismissal of the suit.

I

Mrs. Sarita Kenedy East was a resident of Sarita, located in Kenedy County, Texas. On January 22, 1960, at the age of 71, she created the John G. and Marie Stella Kenedy Memorial Foundation, a charitable organization under the Texas Non-Profit Corporation Act. She simultaneously executed a will naming the Foundation as the residuary devisee and legatee, provisions that would pass assets then worth in excess of twenty million dollars, assets now valued in excess of three hundred million dollars. Under Texas law and the by-laws of the Foundation, control of the Foundation rested with its members, who had full power to appoint the Foundation's directors. Mrs. East initially named herself as the sole member, but in February she added as members,

Lee H. Lytton, Jr., a relative, and Jacob Floyd, one of her attorneys. Lytton and Floyd were members only until June 30, 1960 when, at the request of Mrs. East, they resigned. She remained as the sole member of the Foundation until the end of the year when, by a codicil executed from her hospital bed in New York, she appointed Brother Leo as an additional member. Mrs. East died on February 11, 1961, leaving Brother Leo in control of the Foundation. Her will was admitted to probate by the County Court of Kenedy County on March 6, 1961. The will was soon contested by some thirty-nine persons, hopeful seekers that later grew to over one hundred persons, claiming to be heirs at law and seeking to set aside the will on the grounds of fraud, undue influence and lack of testamentary capacity. Of course, the Foundation's future turned on the validity of Mrs. East's 1960 will.

Meanwhile Lytton, represented by Floyd, sued in the 79th Judicial District Court of Jim Wells County, Texas alleging that Brother Leo had exercised undue influence over Mrs. East in persuading her to change the membership of the Foundation. Brother Leo then retained William R. Joyce, a lawyer from Washington D.C.

It is from these facts that the conspiracy to deprive Brother Leo of his constitutional rights, alleged in the suit before us, is said to have been born. According to Brother Leo, the practical difficulties of simultaneously defending the will from charges of undue influence, fraud and lack of capacity, while prosecuting similar charges leveled against Mrs. East's appointment of members of the Foundation during the same time period, fueled the efforts to settle the contest over Mrs. East's changes in the membership of the Foundation.

A tentative settlement of the suit over membership was reached among all parties except Brother Leo. He alleges that he initially refused to settle, but finally

agreed in September 1963 after he was assigned to a remote monastery in Chile and then on threat of excommunication; that in any event his agreement was conditioned upon approval of the Holy See. While it is undisputed that Brother Leo signed a settlement agreement and agreed judgment to be filed in the 79th District Court, Brother Leo asserts that before it was filed he had revoked his consent to entry of the consent judgment, and in a meeting in Miami, Florida in January 1964 he had expressly forbade Robert Jewett of the law firm of Baker and Botts from representing him; that for his obstinance he was sent to a monastery in Northern Canada and forbidden to discuss the case. He asserts that his Abbot, Dom Thomas Keating, on August 31, 1964, "falsely" sent a telegram to Jewett purporting to consent to the entry of the judgment on behalf of Brother Leo "as the superior of Christopher Gregory . . . in virtue of an understanding which I have with him." The agreed judgment was presented to the trial court and filed on September 1, 1964, without notice to Joyce, Brother Leo's Washington D.C. counsel, and while he was incommunicado in the Canadian monastery. He asserts that he learned of the judgment entered in Jim Wells County only through an article in the New York Times.

In March 1966 Gregory filed a separate suit, termed a bill of review, seeking review of the interlocutory judgment of September 1, 1964. The judgment had been made interlocutory pending the outcome of the will contests. See, e.g., *Turcotte v. Trevino*, 499 S.W.2d 705 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). In *Gregory v. Lytton*, 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) the Texas Court of Civil Appeals affirmed the state district court's dismissal of the suit, on the basis that a bill of review did not lie to attack an interlocutory judgment.

On August 1, 1968, Brother Leo filed in the original suit in the District Court of Jim Wells County, the suit

attacking Mrs. East's changes in Foundation membership, a motion to set aside the interlocutory judgment entered by that court on September 1, 1964. In his motion to set aside, Brother Leo alleged, *inter alia*, that his consent to the settlement agreement and agreed judgment were obtained by duress and without his effective consent. Here the matter rested for some eleven years.

On July 24, 1979, and after all the contests of the 1960 will had been concluded, the Attorney General of Texas filed a Motion for Entry of Final Judgment and to Dismiss Gregory's Motion to Set Aside Interlocutory Judgment. With a hearing on this motion scheduled for September 21, 1979, Brother Leo filed on September 13, 1979, an amended motion to set aside the agreed judgment. The amended motion for the first time requested trial by jury. The Alice National Bank, as independent executor of the East estate, Kenneth Oden, counsel to the bank, the Kenedy Memorial Foundation, Thomas J. Drury, Bishop of the Diocese of Corpus Christi, Lytton and the president of the bank intervened in the suit and answered Gregory's motion, denying all its allegations.

Brother Leo did not question this joinder of issues and all parties appeared at the hearing on September 21, 1979, including Brother Leo. Brother Leo testified at the hearing that while he had personally signed the agreed interlocutory judgment, he did not consent as of September 21, 1979, to the entry of the final judgment. Although he requested a jury, Gregory's counsel argued that he was only prepared for a hearing; that he had no notice that there would be a full trial of the issues. Regardless, he requested no continuance and did not press his jury demand. Brother Leo's Texas counsel argued that he was entitled to a "full" trial of the consent issue but that in any event, under Texas law the interlocutory judgment could not be made final absent his consent when final judgment was entered, a consent that was indisputably absent. The trial court rejected his argu-

ment and entered final judgment from which Brother Leo appealed.

In his appeal Brother Leo argued to the San Antonio Court of Civil Appeals that his consent when the judgment was made final was required, that he had been denied due process of law and his right to jury trial under both the Texas and United States Constitutions. That court affirmed. *Gregory v. White*, 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, writ ref'd. n.r.e.), cert. denied, 452 U.S. 939 (1981). The panel was unanimous that the evidence conclusively demonstrated that Gregory had executed the settlement agreement and "neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered." *Id.* at 404. In sum, the court rejected the contention that Brother Leo's attorneys' lacked authority to represent him when the interlocutory judgment was filed and that, it held, was the critical time under Texas law.

In his application for writ of error to the Texas Supreme Court, Brother Leo urged that the Court of Civil Appeals had erred in five respects. First, it erred in affirming the trial courts' entry of final judgment without conducting a trial on the merits. Second, it erred in not requiring a full trial when the trial judge knew that a lack of consent was being asserted. Third, it erred in holding that under Texas law the jury demand was untimely. Fourth, it erred in rejecting his argument that entry of the final judgment denied him due process of law. Fifth, it erred in holding that a consent to entry of an interlocutory judgment was to be treated under Texas law as a consent to entry of a final judgment. The Texas Supreme Court refused the writ application with its notation of n.r.e.

In his Petition of Writ of Certiorari, Brother Leo, represented by his present counsel, urged that "The ac-

tions of the Courts below violated the due process clause of the Fourteenth Amendment to the United States Constitution," that he was denied due process and his right under state law to trial by jury. After denial of certiorari, Brother Leo filed this suit under 42 U.S.C. 1983.

II

Brother Leo alleged in his federal suit that he was "deprived . . . of his rights to trial and trial by jury in violation of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution." He argues that he never had a trial on the issues of his undue influence of Mrs. East, that he lacked adequate notice of the hearing of September 1, 1964, particularly given that once the interlocutory judgment was entered he was barred from attacking it, "either by way of appeal or when it was converted into a final judgment."

Defendants urged dismissal contending that no claim for constitutional wrong had been stated; that any claim was barred by laches and limitations and precluded by principles of *res judicata* and collateral estoppel.

We are persuaded that Brother Leo's effort to state a claim that Texas has deprived him of his rights to a hearing and to a trial by jury must fail.¹ The undis-

¹ All parties here and below have referred to matters extrinsic to the complaint. They were also considered by the district court in its grant of a motion to dismiss. Ordinarily, the defense of *res judicata* cannot be determined on a motion to dismiss for failure to state a claim. Here, the state court decisions were virtually apparent on the face of the complaint. In any event, all parties have treated the skeleton facts outlining the history of the state court decisions as a statement of the set of facts that Brother Leo might adduce under the complaint.

We could, with equal confidence, treat the ruling below as a grant of summary judgment. All parties had a full opportunity to present their arguments below and there is no issue over the facts essential to our opinion. In this circumstance, we see no reason to

puted facts are that Texas heard his contention that his consent to entry of judgment was not effective and rejected it. A trial judge in Jim Wells County heard evidence, including the testimony of Brother Leo, and concluded that under Texas law his agreement was binding. His claims that the hearing on his motion to set aside the interlocutory judgment was inadequate under state law and the United States Constitution were thereafter heard and rejected by two levels of Texas Courts. At each stage he was represented by counsel.

Whatever the label placed on the proceeding in which Brother Leo's motion to set aside the interlocutory judgment was decided, and regardless of our view of its constitutional sufficiency, if we are bound by the state court decisions that he received a full opportunity to present his factual and legal theories—both that his earlier consent was ineffective and that his present consent was necessary—we must affirm the district court's dismissal. We turn to that issue.

III

We must give to the state court rulings that the hearings given Brother Leo on his attack upon the interlocutory judgment were adequate under the United States Constitution and state law, the preclusive effect that Texas courts would give to them. See U.S. Const. art. IV, § 1; 28 U.S.C. § 1738.

Allen v. McCurry, 449 U.S. 90 (1980), held that federal courts must look to state rules of issue preclusion for issues actually litigated, but left open the possibility that federal issues that might have been litigated, but were not, would be treated differently under 42 U.S.C. § 1983. The court closed that door in *Migra v. Warren City School District Board of Education*, 104 S.Ct. 892 (1984), noting that "the policy concerns underlying

linger over the distinction, and we simply affirm the judgment for defendants entered by the district court.

§ 1983 would [not] justify a distinction between the issue preclusive and the claim preclusive effect of state-court judgments.” *Id.* at 897.

We have recently reviewed the Texas law of res judicata.² In *Flores v. Edinburg Consolidated Independent School District*, 741 F.2d 773 (5th Cir. 1984), we explained that issues actually litigated are barred in subsequent suits between the parties even though a different cause of action is asserted; that when the subsequent suits asserts the same cause of action, issues that might have been litigated are precluded as well. We rejected the suggestion that a suit under 42 U.S.C. § 1983 was necessarily a different cause of action from a state cause of action for tort drawn from the same facts explaining:

that “a different cause of action” is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed issues raised in the plaintiff’s original complaint are conceded in the defendant’s favor.

Id. at 777.

We are persuaded that measured by Texas rules of preclusion every attack now leveled in federal court against the September 21, 1979, hearing in Jim Wells County was presented to the Texas courts, and rejected. Should we add, and we need not, that Brother Leo is

² In our recent opinion in *McWilliams v. McWilliams*, 804 F.2d 1400, 1403 (5th Cir. 1986), Judge Wisdom described the competing interests in the decision to accept state law rules of both issue and claim preclusion in cases prosecuted under the Civil War Amendments concluding that “the difference between an inferior court and the United States Supreme Court effectively eliminates options in our decision-making function. We must honor the claim-preclusive effect of the state court’s judgment, regardless of Section 1983.”

also bound by what he might have argued in the Texas courts, his argument loses the little force it has. This is so because Brother Leo surely asserts in federal court the same cause of action he asserted in state court. He must be able to maintain his federal suit with "all the disputed issues raised in [his motion to set aside] . . . conceded in . . . defendant[s'] favor." *Id.* This he cannot do.

New and able counsel attempt to extricate Brother Leo from the reality that he has tried his constitutional and state law claims in state court, and lost. The escape argument, as we understand it, is that he does not seek a second trial of the state determined issues. Rather, it is the sum of all the rulings that is the alleged state deprivation of constitutional rights. He argues that changes in state law, with which he does not here quarrel, had the effect in *his* case of foreclosing a fair hearing; that he was placed in a legal Catch 22.

The argument is that by first rejecting his bill of review on the basis that the bill would not lie to attack an interlocutory judgment, and latter holding that his consent to the entry of the interlocutory judgment could not be defeated by objecting after its entry, Texas courts effectively held that "Gregory's first challenge was too early; his second challenge too late."

We find no such dilemma. That a bill of review attacking the interlocutory judgment was not allowed did not foreclose his motion to set aside the judgment filed in that case—as demonstrated by the fact that it was heard. Issue over the effectiveness of Brother Leo's consent to entry of the interlocutory judgment was joined on his motion to set aside. He then tried in the Texas courts the issue of the adequacy of that hearing under state law and the United States Constitution. Under § 1738 and the full faith and credit clause, whether or not he is now asserting the same cause of action, we must accept the state courts' decisions.

We do not here face the issue of the preclusive effect under state law of a state court judgment flawed by a systemic failure of constitutional dimensions. Nothing suggests that the appellate review of the rejection of Brother Leo's motion to set aside was constitutionally suspect, whether or not one agrees with the rulings. In this critical sense, there is no question but that Brother Leo's perceived Catch 22 did not exist.

Of course, the right to a jury including the timeliness of the jury denial were state law issues decided against Brother Leo and present no constitutional issue were we free to reconsider the state rulings, and as we have explained, we are not.

In sum, Brother Leo's federal court suit is ultimately an attack on the hearing held in Jim Wells County on September 21, 1979. It is a fight that he elected to make in the Texas courts with a right of review by writ of certiorari from the Supreme Court of the United States to the Texas Supreme Court. We are not free to decide the issues a second time.

We have rejected Brother Leo's arguments, but we are not persuaded that his appeal was frivolous. Defendants' request for double costs and counsel fees is rejected.

AFFIRMED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

Civil Action C-82-84

CHRISTOPHER GREGORY

v.

THOMAS J. DRURY, *et al.*

[Filed Jan. 27, 1986]

FINAL JUDGMENT

In accordance with the Order filed on January 24, 1986, it is ORDERED that judgment be entered.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 24th day of January, 1986.

/s/ Carl O. Bue, Jr.
CARL O. BUE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action C-82-84

CHRISTOPHER GREGORY

vs.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S.
KENEDY, LEE H. LYTTON, JR., KENNETH ODEN, MARK
WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,
AND ALICE NATIONAL BANK

[Filed Jan. 27, 1986]

ORDER

On the 9th day of January, 1986, pursuant to notice to all parties of the consideration of all pending motions by the Court, there came on to be heard Defendants' Motion for Judgment on the Pleadings and Dismissal, and the Plaintiff appearing by his counsel of record and all Defendants' [sic] appearing by their respective counsel of record, and the Court having examined all the pleadings herein and the affidavits submitted in support and opposition thereof, and the Court having reviewed the Briefs of the respective parties, and having heard the arguments of Counsel, and being otherwise fully advised in the premises, the Court finds that the Plaintiff is not entitled to the relief which he claims and that the Defendants' [sic] are entitled to a Judgment in their favor and a Dismissal of Plaintiff's Suit;

IT IS HEREBY ORDERED, that Defendants' Motion for Judgment on the Pleadings is SUSTAINED, and this cause is DISMISSED with prejudice at Plaintiff's cost. The Court having considered all other motions and matters pending herein, all other relief which has not been expressly granted herein, or which is inconsistent with the Dismissal of this cause, is expressly DENIED.

DATED the 24th day of January, 1986.

/s/ Carl O. Bue, Jr.
 CARL O. BUE, Jr.
 District Judge Presiding

APPENDIX C

COURT OF CIVIL APPEALS OF TEXAS
SAN ANTONIO

No. 16482

CHRISTOPHER GREGORY,
Appellant,
v.

MARK WHITE, ATTORNEY GENERAL
OF THE STATE OF TEXAS, *et al.*,
Appellees.

July 25, 1980

OPINION

MURRAY, *Justice.*

This is an appeal by Christopher Gregory, also known as Brother Leo, from a judgment entered by the 79th Judicial District Court of Jim Wells County, Texas. The judgment in this cause determined who was entitled to serve as members and directors of The John G. and Marie Stella Kenedy Memorial Foundation, which was established by Sarita K. East prior to her death on February 11, 1961. This appeal represents the latest installment in the East will litigation, which began in the early 1960's.¹ The present suit was instituted in 1961 and was settled by agreement in 1963. The settle-

¹ As pointed out by the supreme court in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), there have been numerous appeals involving the East estate. *See id.* at 684 n.1.

ment agreement, reduced to writing and signed by all of the parties, was incorporated in a judgment on September 1, 1964. The judgment was expressly made interlocutory pending the outcome of two suits in which claims against the East estate were being adjudicated. Approximately eighteen months after the interlocutory judgment was rendered the appellant filed a petition in the nature of a bill of review to set it aside. The trial court dismissed the petition reasoning that the order was not a final judgment and was therefore not properly the subject of a suit in the nature of a bill of review. On appeal this court affirmed the trial court's action dismissing the appellant's petition. See *Gregory v. Lytton*, 422 S.W.2d 586, 591 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.)²

On July 24, 1979, the appellees filed a motion for the entry of final judgment arguing that the supreme court's decision in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), removed the last obstacle to making the September 1, 1964, judgment final. Subsequently, on September 14, 1979, the appellant filed a first amended motion to set aside the interlocutory judgment contending that the settlement agreement upon which the judgment was based is void for the following reasons: lack of authority, duress, failure of condition precedent, and because he no longer consented to the agreement.³

After a hearing the trial court granted the appellees' motion for the entry of final judgment. It is from this judgment that the appellant has perfected an appeal.

By several points of error the appellant contends that the trial court erred in entering a final judgment because

² The background of this case is fully set out in *Gregory v. Lytton*, and will not be repeated here. We will, of course, provide additional facts necessary for an understanding of the disposition of this appeal.

³ Appellant's original motion to set aside the interlocutory judgment was filed on August 1, 1968.

(1) he notified the court prior to the entry of final judgment that he had withdrawn his consent to the settlement agreement; and (2) his consent to the settlement agreement was conditional and the condition has not been met.

[1, 2] A valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement the judgment of the court, the trial judge has knowledge that one of the parties to the suit has withdrawn his consent. Moreover, an agreed judgment should not be entered if the trial judge possesses information that would reasonably prompt further inquiry, and this inquiry, if pursued, would disclose a lack of consent. *See Burnaman v. Heaton*, 150 Tex. 333, 339, 240 S.W.2d 288, 291-92 (1951).

[3] Once a settlement contract, agreed to by all of the parties to the suit, is incorporated in a judgment of the court, however, a party is precluded from attacking the validity of the judgment in the absence of an allegation and proof of fraud or collusion. This rule is simply an application of the general principle that one cannot complain of that to which he has agreed. *See De Lee v. Allied Finance Co.*, 408 S.W.2d 245, 247 (Tex. Civ. App.—Dallas 1966, no writ). In the instant case the evidence conclusively establishes that the appellant signed the settlement agreement and that the judge had no reason to know of any dissatisfaction that the appellant might have had with the agreement at the time the interlocutory judgment was rendered.

[4] There is no justification either in law or logic for applying a different rule to agreed interlocutory judgments than to agreed final judgments. An agreed interlocutory judgment would be of little value if its terms could be avoided by the withdrawal of consent of one of the parties. Accordingly, we hold that the above-stated principles governing agreed judgments apply to all consent judgments whether interlocutory or final.

[5] In support of his assertion that he never consented unconditionally to the settlement agreement the appellant relies on his own testimony adduced at the hearing on the appellees' motion for entry of final judgment. In this regard he testified that he was told by his superior that if he did not sign the agreement he would be excommunicated from the Catholic Church. He subsequently consulted another superior who suggested that he sign the document and attach to it a cover letter to the Holy See in Rome, which would require the Holy See's written approval before the settlement agreement was released to the court.

The appellant argues that his lawyers were not authorized to effect the settlement agreement since he had conditioned his consent on the approval of the Holy See and the condition has not been met. We disagree.

In April of 1961 the Houston, Texas, law firm of Baker & Botts was retained to represent the appellant and others, including The John G. and Marie Stella Kenedy Memorial Foundation. Thereafter, in 1963 a settlement agreement was entered into by the parties. The appellant signed this agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.

The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communi-

cate to his attorneys, the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. See *Allsman v. Robinson*, 25 S.W.2d 237, 239 (Tex. Civ. App.—El Paso 1930, no writ).

For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court.

CADENA, Chief Justice, dissenting.

There can be no quarrel with the holding by the majority that a consent interlocutory judgment cannot be set aside if it was entered prior to the time that the consent of one of the parties was revoked. But appellant in this case complains of the fact that the trial court entered a final judgment without a hearing on the merits after he had made known to the court that he had withdrawn his consent to the agreement on which the agreed interlocutory judgment was based.

The authorities cited in the majority opinion hold that a valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement of the parties the judgment of the court the trial judge has knowledge that one of the parties to the agreement has withdrawn his consent or if, prior to rendition of the judgment, the trial court has knowledge of facts which would reasonably prompt further inquiry and such inquiry would disclose the lack of continued consent. It is clear in this case that, at the time the final judgment was rendered, the trial court was fully aware of the fact that appellant had revoked his consent. While it is true that at the time the interlocutory order was rendered the trial court had no reason to suspect that appellant was dissatisfied with the agreement, this fact can justify

no more than a holding that the interlocutory order was properly rendered.

Since appellant did not consent to the rendition of the final judgment, basing such judgment on the repudiated agreement was clearly error. *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (1951).

APPENDIX D

Entered November 28, 1979

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79th JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA
KENEDY FOUNDATION, *et al.*

FINAL JUDGMENT

BE IT REMEMBERED that on the 21st day of September, 1979 there came on to be heard the motion of the Honorable Mark White, Attorney General of the State of Texas, and others, for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, and the Court having heard all witnesses called by any party, and having read their written submissions and having fully considered the matter, it is the opinion of the Court that said motion should be granted; and

The temporary injunction referred to in Article VII of this Court's September 1, 1964 judgment as having theretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85 styled *Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased, against The John G. and Marie Stella Kenedy Memorial Foundation, et al.*,

having been dissolved and avoided with the dismissal with prejudice of that action on September 25, 1978, and all contests to the probate of the Will of Sarita K. East having been finally resolved and all other conditions to the entry of final judgment recited in *Gregory v. Lytton*, No. 14633 in the Court of Civil Appeals, San Antonio Division, having been fulfilled,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The motion for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, is granted in all respects.

2. The interlocutory injunctive provisions of Article V of the September 1, 1964 judgment are hereby vacated and dissolved and the said judgment is in all other respects reaffirmed and made final.

3. The John G. and Marie Stella Kenedy Memorial Foundation, the Alice National Bank of Alice, Texas, and the Estate of Sarita Kennedy East are hereby authorized and directed to take all steps necessary to execute, acknowledge, and deliver the instrument of assignment, in the form attached as Exhibit C to this Court's Judgment of September 1, 1964, as modified to take account of intervening events as shown by Exhibit A attached hereto, to the Sarita Kennedy East Foundation ("SKEF"), together with all royalty payments which have accrued thereon to SKEF and a proper accounting therefor.

4. This final judgment is without prejudice to the position of the respective parties concerning certain outstanding differences between them as to interest on such royalty payments and other matters concerning the proper interpretation of their settlement agreement.

5. All costs shall be taxed against the party incurring such costs for which execution shall issue if not timely paid.

RENDERED and SIGNED this 28th day of November, 1979.

s/ C.W. Laughlin
C.W. LAUGHLIN
District Judge

THE STATE OF TEXAS)
COUNTY OF JIM HOGG)

KNOW ALL MEN BY THESE PRESENTS: that The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Alice National Bank, a national banking association with its place of business in Alice, Texas, acting herein only in its capacity as executor of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars (\$10.00) cash and other good and valuable considerations in hand paid by the Sarita Kenedy East Foundation Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend K.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese,

dated September 1, 1947, of record in Vol. 28, Pages 319-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other materials produced and saved from the above described lands.

This sale and conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

Recorded in Deed or
Lease * Records of
Jim Hogg County at

GRANTEE	DATE OF INSTRUMENT	VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese			
Stella Lytton	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnât	October 19, 1947	28	525 et seq.
Irene Putegnât	September 1, 1957	28	527 et seq.
Fannie D. Putegnât, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnât, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars (\$25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above described lands which provides (i) for a royalty of less than one-eighth ($1/8$ th) of all oil produced, saved and sold, of less than one-eighth ($1/8$ th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth ($1/8$ th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess

of \$10,000 or \$2 per acre for the lands leased, whichever shall be the lesser amount, (iii) for delay rentals in excess of \$2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths ($7/8$ ths) of one-eighth ($1/8$ th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time

whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated 1st day of September, 1964, and the Final Judgment in said Cause entered in November 1979, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred

Thousand Dollars (\$14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

This instrument is subject to certain letter agreement dated February 20, 1964.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly author-

ized, and to be affixed with its corporate seal, this the
day of 1979, as of the 1st day of
April, 1962.

THE JOHN G. AND MARIE
STELLA KENEDY MEMORIAL
FOUNDATION

ATTEST:

By: _____

President

GRANTOR

Secretary

ALICE NATIONAL BANK

ATTEST:

By: _____

President

Cashier

Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 4:06 o'clock p.m.

NOV 28 1979

Manuel M. Perez
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

APPENDIX E

Entered September 1, 1964

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION, *et al.*

JUDGMENT

BE IT REMEMBERED that on this 1st day of September, 1964, there came on to be heard the above entitled and numbered cause, wherein Lee H. Lytton, Jr. is plaintiff and cross-defendant, Jacob S. Floyd is defendant and cross-plaintiff, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, is intervenor, and The John G. and Marie Stella Kenedy Memorial Foundation, T. M. Doyle, John J. Meehan, J. Peter Grace, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, Lawrence E. Wood and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., are defendants and cross-defendants, and wherein the Attorney General of the State of Texas is joined as a party, having been served with process and citation in accordance with the terms of Article 4412a, Section 3, Vernon's Civil Statutes of Texas, these being

all of the parties of record in this suit, and it appearing to the court that T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong and Lawrence E. Wood have this day, in open court, resigned from, and renounced their rights to, their respective offices as members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, and that the plaintiff and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, by and through their attorneys of record, announced in open court that they, the said plaintiffs and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, no longer wished to prosecute this suit as against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood and requested that the court dismiss this suit, with prejudice, as against said parties;

It is accordingly ORDERED, ADJUDGED and DECREED by the court that this suit be and the same is hereby dismissed, with prejudice, against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood.

And then come the remaining parties to this action, to-wit, plaintiff and cross-defendant Lee H. Lytton, Jr., defendant and cross-plaintiff Jacob S. Floyd, intervenor Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, defendants and cross-defendants The John G. and Marie Stella Kenedy Memorial Foundation, Christopher Gregory, sometimes known as Brother Leo O.C.S.O., J. Peter Grace and the Attorney General of the State of Texas, all by and through

their respective attorneys of record, and announced ready for trial; whereupon, a jury being waived by all parties, it was announced to the court that the parties hereto had agreed to compromise and settle all issues raised herein, as well as all issues made the basis of this suit, it being distinctly understood that in making this settlement no party makes any admission with regard to any of the allegations made in the pleadings on file in this suit; and it further appearing that Lee H. Lytton, Jr. and Jacob S. Floyd have this day, in open court, ratified their resignations, dated June 13, 1960, as members of The John G. and Marie Stella Kenedy Memorial Foundation, and that the sole and only members of said The John G. and Marie Stella Kenedy Memorial Foundation now remaining are J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O.; and it further appearing to the court that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereupon, in open court, appointed, in compliance with the By-Laws of said The John G. and Marie Stella Kenedy Memorial Foundation, the following persons as members of such Foundation, to-wit:

Most Reverend M. S. Garriga, Roman Catholic
Bishop of the Diocese of Corpus Christi, and/or his
successors in office

Elena S. Kenedy

Lee H. Lytton, Jr.

Kenneth Oden

B.R. Goldapp

and it further appearing that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereafter, in open court, resigned from their respective offices as members and/or directors of said The John G. and Marie Stella Kenedy Memorial Foundation in compliance with the By-Laws of such Foundation; and it further appearing to the court that the aforesaid members, to-wit, Most Reverend M. S. Garriga, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth

Oden and B.R. Goldapp, have, in open court, duly elected the following named persons as directors of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-Laws thereof, to-wit:

Most Reverend M. S. Garriga, Roman Catholic
Bishop of the Diocese of Corpus Christi
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

and it further appearing to the court that the aforesaid directors, have in open court, duly elected the following officers of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-laws thereof, to-wit:

Elena S. Kenedy—*President*
Bishop M. S. Garriga—*Vice President*
Kenneth Oden—*Secretary-Treasurer*
Lee H. Lytton, Jr.—*Assistant Secretary-Treasurer*

and it appearing to the court that the members have, in open court, adopted amendments to the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation in the form of Exhibit A attached hereto and made a part hereof, and have, in open court, adopted amendments to the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation, which said amendments to the By-Laws are set forth in Exhibit B attached hereto and made a part hereof, and the court having examined said amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation are found the same to be in proper order and to reflect correctly the agreement of the parties and that such amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation should be approved and ratified by the court; and it appearing to the court, and the court having been fully advised in the premises, that the afore-

said compromise and settlement should be approved and that Judgment should be entered herein in accordance with such settlement agreed upon; and it further appearing to the court that the proper officers of the said Foundation, also in open court, in accordance with this compromise agreement and Judgment have executed the instrument, a copy of which is attached to this Judgment and made a part hereof and marked Exhibit C, and which instrument has been examined by the court and found to be in proper order and to reflect correctly the agreement of the parties and such instrument should be approved and ratified by the court; and it further appearing to the court that all parties to this action acting by and through their duly authorized attorneys of record, in open court, have approved this Judgment by affixing their signatures hereto; and it further appearing to the court that the Attorney General of Texas, in open court, by and through his designated Assistant Attorney General, has stated that the Attorney General's Office has reviewed the terms, conditions and provisions of this settlement and all exhibits attached hereto, and that the said terms, conditions and provisions have been found to be in the best interests of the public beneficiaries of Texas, and therefore the Attorney General of Texas does hereby ratify and grant to this settlement according to the provisions of Article 4412a, Vernon's Civil Statutes of Texas, and the court being of the opinion that upon the recommendation of the Attorney General of Texas this settlement be in all things approved;

It is accordingly ORDERED, ADJUDGED and DECREED by the court—

(1) That on the date of this Judgment, and pursuant to the appointment of members and election of directors and officers as aforesaid, the present and only duly and legally authorized and elected members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation are as follows:

- Members:* Most REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP
- Directors:* MOST REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi
ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP
- Officers:* ELENA S. KENEDY—*President*
BISHOP M.S. GARRIGA—*Vice President*
KENNETH ODEN—*Secretary-Treasurer*
LEE H. LYTTON, JR.—*Assistant Secretary-Treasurer*

(2) That the meetings and acts of the members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, as reflected by the minutes thereof, held or done in open court this day, be and they are in all things confirmed, ratified and approved as the legal and binding acts of The John G. and Marie Stella Kenedy Memorial Foundation.

(3) That the instrument executed by the President of The John G. and Marie Stella Kenedy Memorial Foundation and attested by its Secretary be and it is hereby declared to be the legal act of The John G. and Marie Stella Kenedy Memorial Foundation, a copy of such instrument, marked Exhibit C, being attached to and all of its terms being made a part of this Judgment, as if fully incorporated herein.

(4) That this suit, as to all issues raised herein by any party herein, be and the same is hereby dismissed, with prejudice, as against the said J. Peter Grace and

Christopher Gregory, sometimes known as Brother Leo O.C.S.O. The John G. and Marie Stella Kenedy Memorial Foundation is hereby dismissed as a party defendant.

APPROVED AS TO FORM AND SUBSTANCE:

s/ LEE H. LYTTON, JR.
LEE H. LYTTON, JR.
Plaintiff

By s/ JACOB S. FLOYD
JACOB S. FLOYD
Defendant and Cross-Plaintiff

PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas

By s/ KENNETH ODEN
KENNETH ODEN
Attorneys for Plaintiff Lee H. Lytton, Jr.,
Defendant and Cross-Plaintiff Jacob S. Floyd and
Executors of the Estate of Sarita Kenedy East,
Deceased

By s/ M. S. GARRIGA
M.S. GARRIGA, Roman Catholic Bishop of the
Diocese of Corpus Christi
Intervenor

By s/ ELMORE BORCHERS
ELMORE BORCHERS
Laredo, Texas
and

s/ PATRICK J. HORKIN, JR.

PATRICK J. HORKIN, JR.
717 Commerce Building
Corpus Christi, Texas
Attorneys for Intervenor M. S. Garriga, Roman
Catholic Bishop of the Diocese of Corpus Christi

s/ T. M. DOYLE
T. M. DOYLE
Defendant and Cross-Defendant

s/ JOHN J. MEEHAN
JOHN J. MEEHAN
Defendant and Cross-Defendant

s/ J. PETER GRACE
J. PETER GRACE
Defendant and Cross-Defendant

s/ REV. PATRICK J. PEYTON, C.S.C.
REV. PATRICK J. PEYTON, C.S.C.
Defendant and Cross-Defendant,
Acting Individually and as a Member of the
Congregation of Holy Cross Under Valid Authority
of His Lawful Religious Superior

s/ CHRISTOPHER GREGORY
CHRISTOPHER GREGORY
Sometimes Known as Brother Leo, O.C.S.O.,
Defendant and Cross-Defendant, Acting
Individually and as a Religious of the Cistercian
Order of the Strict Observance Under Valid
Authority of His Lawful Religious Superior

BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

s/ DENMAN MOODY
DENMAN MOODY
Attorneys for Defendants and Cross-Defendants
Doyle, Meehan, Grace, Peyton and Gregory
HENRIETTA K. ARMSTRONG
Defendant and Cross-Defendant
THOMAS M. ARMSTRONG
Defendant and Cross-Defendant (pro forma)
LAWRENCE E. WOOD
Defendant and Cross-Defendant

KLEBERG, MOBLEY, LOCKETT & WEIL
Jones Building
Corpus Christi, Texas

By:

M. HARVEY WEIL
Attorneys for Defendants and Cross-Defendants
Henrietta K. Armstrong, Joined Pro Forma By
Her Husband, Thomas M. Armstrong, and
Lawrence Wood

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION
Defendant and Cross-Defendant

By: BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

s/ DENMAN MOODY
DENMAN MOODY

WAGGONER CARR
Attorney General of the State of Texas

By:s/ J. GORDON ZUBER
J. GORDON ZUBER
Assistant Attorney General

s/ JACOB S. FLOYD
JACOB S. FLOYD
Independent Executor of the Estate of
Sarita Kenedy East, Deceased

ALICE NATIONAL BANK OF ALICE, TEXAS
Independent Executor of the Estate of Sarita Kenedy
East, Deceased

By:s/ B.R. GOLDAPP
B.R. GOLDAPP

V

All temporary restraining orders heretofore issued by this Court are hereby vacated and dissolved, and by agreement of the parties hereto, they are hereby enjoined and restrained from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees, and representatives, insofar as any such monies and/or royalties have heretofore been or may hereafter be received under the terms of any and all of the three following described instruments, to-wit:

- (1) That certain instrument dated April 21, 1960, recorded in the Oil & Gas Records of Kenedy County, Texas, in Volume 9, Pages 544 et seq.,
- (2) That certain instrument dated February 13, 1960, recorded in the Deed Records of Jim Hogg County, Texas, in Volume 42, Pages 52, et seq. and
- (3) That certain instrument dated January 2, 1961, recorded in the Oil & Gas Lease Records of Jim Hogg County, Texas, in Volume 50, Page 305, et seq.

EXCEPTED, HOWEVER, from this temporary injunction and the terms and provisions thereof are any and all monies expended heretofore, or which may be expended hereafter, for the payment of taxes, or for payment of compensation to bookkeepers or auditors, and for investment in term United States Government securities; and they are further restrained and enjoined from assigning, transferring, conveying, pledging, mortgaging, or hypothecating any part or portion of the rights and/or properties purporting to pass from Sarita K. East or The John G. and Marie Stella Kenedy Memorial Foundation under the terms of any and all of said three instruments

above described; PROVIDED, HOWEVER, that nothing contained in the temporary injunction shall in any wise be construed to affect, interfere with, or terminate in any manner, the existing rights of the said John G. and Marie Stella Kenedy Memorial Foundation, its officers, members, directors, agents, and representatives, to demand, collect, and receive all monies and/or royalties due, or to become due, from any person, firm, or corporation, under the terms of said three written instruments above described.

This is an interlocutory order and shall remain in full force and effect until further ordered by this Court.

VI

All costs of suit shall abide the issue.

VII

And it further appearing to the court that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled, Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, as a result of which, the parties hereto have refrained from executing and delivering the assignment, a copy of which is attached to this Judgment as Exhibit C;

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that all language hereinabove contained inconsistent with this finding is hereby amended and modified to conform hereto, and the proper parties and persons are hereby authorized and directed to execute, acknowledge and deliver such assignment upon the vacation or avoidance of such temporary injunction and the temporary injunction hereinabove provided for.

RENDERED AND SIGNED this 1st day of September,
1964.

s/ C. W. Laughlin
C. W. LAUGHLIN, *District Judge.*

ARTICLES OF AMENDMENT TO THE ARTICLES
OF INCORPORATION OF THE JOHN G. AND
MARIE STELLA KENEDY
MEMORIAL FOUNDATION

Pursuant to the provisions of Article 4.03 of the Texas Non-Profit Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation which add thereto a new Article IX dealing with the membership of the Foundation and a new Article X dealing with the contributions to be made by the Foundation:

1. The name of the Corporation is The John G. and Marie Stella Kenedy Memorial Foundation.
2. The following amendment to the Articles of Incorporation was adopted by the Corporation on Sept. 1, 1964.

The Articles of Incorporation are hereby amended by adding thereto a new Article IX and a new Article X reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

- (ii) at least two other practical Catholics;
- (iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent ($33\frac{1}{3}\%$) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

3. The amendment was adopted in the following manner:

The amendment was adopted at a meeting of the members of the Foundation held on September 1, 1964, at which a quorum was present, and the amendment received at least two-thirds of the votes which members present or represented by proxy at such meeting were entitled to cast.

DATED _____; 19—

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION

By _____
Its President

Its Secretary

THE STATE OF TEXAS)
COUNTY OF JIM WELLS)

I, _____, a Notary Public, do hereby certify that on this ____ day of _____, 196—, personally appeared before me _____, and being duly sworn, declared that he is President of the Corporation executing the foregoing document, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public in and for
Jim Wells County, Texas
My Commission Expires: _____

(Notarial Seal)

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION

Certified Copy of Amendments to By-Laws

I, _____, Secretary of The John G. and Marie Stella Kenedy Memorial Foundation, a non-profit, charitable corporation organized and existing under the laws of the State of Texas, do hereby certify that at a meeting of the members and directors of such Foundation which was duly held in accordance with its By-Laws, the By-Laws of such Foundation were duly amended to cause Article III thereof to be amended to add as a part thereof new paragraphs 1a, 1b, and 1c reading as hereinbelow set forth, to add a new Article XI thereto reading as hereinbelow set forth, and to renumber the present Article XI of such By-Laws as Article XII, and that such amendments to its By-Laws of such Foundation are duly effective and have not been rescinded or modified in any manner.

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, and said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent ($33\frac{1}{3}\%$) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

EXECUTED this — day of ———, 19—.

_____, Secretary
The John G. and Marie Stella
Kenedy Memorial Foundation

(SEAL)

THE STATE OF TEXAS)
COUNTY OF JIM HOGG)

KNOW ALL MEN BY THESE PRESENTS: That The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Jacob S. Floyd and Alice National Bank, a national banking association with its place of business in Alice, Texas, jointly acting herein only in their capacity as executors of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars (\$10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation, Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas, (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 519-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other minerals produced and saved from the above described lands.

This sale conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seventh-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said Lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seventh-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

Recorded in Deed or
Lease * Records of
Jim Hogg County at

GRANTEE	DATE OF INSTRUMENT	VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnath	October 19, 1947	28	525 et seq.
Irene Putegnath	September 1, 1957	28	527 et seq.
Fannie D. Putegnath, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnath, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars (\$25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above lands which provides (i) for a royalty of less than one-eighth ($1/8$ th) of all oil produced, saved and sold, of less than one-eighth ($1/8$ th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth ($1/8$ th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of

\$10,000 or \$2 per acre for the lands leased, whichever shall be the lesser amount, (iii) for delay rentals in excess of \$2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successor and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven eighths (7/8ths) of one-eighth (1/8th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00) provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by

Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of the title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated — day of —, 1963, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand

Dollars (\$14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all of any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the — day of —, 196 .

54a

THE JOHN G. AND MARIE
STELLA KENEDY MEMORIAL
FOUNDATION

ATTEST:

By: _____
President
GRANTOR

Secretary

ALICE NATIONAL BANK

ATTEST:

By: _____
President

Cashier

Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 3:45 o'clock p.m.

SEP 1 1964

Pauline Clinkscales
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

APPENDIX F

COURT OF CIVIL APPEALS OF TEXAS
SAN ANTONIO

No. 14633

CHRISTOPHER GREGORY,
Appellant,

v.

LEE H. LYTTON, JR., *et al.*,
Appellees.

Nov. 1, 1967

Rehearing Denied Dec. 27, 1967.

KLINGEMAN, *Justice.*

This is an appeal from an order dismissing a petition in the nature of a bill of review in Cause No. 13850 in the District Court of Jim Wells County, 79th Judicial District, which bill of review was filed by appellant, Christopher Gregory, also referred to as Brother Leo, to review and set aside an order in Cause No. 12074, dated September 1, 1964, in the same court.

Appellant's only point of error is that the trial court erred in holding that the judgment in cause No. 12074 "is an interlocutory judgment and not a final judgment, and for such reason is not properly the subject of a suit in the nature of an equitable bill of review, and by reason of such holding in dismissing plaintiff's said suit for bill of review."

The principal question to be determined by this Court is whether the judgment of September 1, 1964, is inter-

locutory, and therefore not subject to bill of review, although appellee Bishop Drury has a counterpoint to the effect that even if the judgment in Cause No. 12074 was final, which he asserts is not the case, the record on its face shows that such judgment is based on a contract dated October 28, 1963, containing strict provisions for specific performance, and the bill of review of appellant filed on March 8, 1966, is thereby barred by limitation and laches.

The controversy involves the properties and affairs of Sarita K. East, who died on February 11, 1961. Prior to her death, Mrs. East organized and had incorporated under the Texas Non-Profit Corporation Act, the John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member thereof, but under date of February 11, 1960, Mrs. East appointed Jacob S. Floyd and Lee H. Lytton, Jr., as co-members of such foundation. Sometime thereafter she requested and received their resignations as members. On December 30, 1960, Mrs. East made an additional appointment of Christopher Gregory as co-member during her lifetime. The will of Sarita K. East, dated January 22, 1960, in addition to devises to a number of relatives and former employees, left the residue of her estate to her foundation. A First codicil to said will, bearing the same date as the will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi as her successor to membership in such foundation upon her death. Thereafter, Mrs. East made Second, Third, Fourth and Fifth Codicils to such will, and under the Third Codicil revoked the First Codicil and appointed Peter Grace, Christopher Gregory and Father Patrick J. Peyton as successor members to her after her death. In such will Edgar Turcotte, Jacob S. Floyd and Alice National Bank were named executors. A contest to such will was filed in Kenedy County by Raul Trevino and others claiming to be blood heirs at law of Sarita K. East, and such will

contest was pending at the time of the judgment of September 1, 1964. There was also pending at such time a suit in the District Court of Kenedy County to set aside certain inter vivos deeds from Sarita K. East to The John G. and Marie Stella Kenedy Memorial Foundation, and an injunction had issued out of the District Court of Kenedy County, Texas, in Cause No. 85, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased v. The John G. and Marie Stella Kenedy Memorial Foundation et al., wherein the parties thereto were enjoined from disposing or transferring certain purported assets of the foundation pending determination of the action.

Cause No. 12074 was commenced on the 9th day of April, 1961, by Lee H. Lytton, Jr., complaining of The John G. and Marie Stella Kenedy Memorial Foundation and others, including appellant, in which petition plaintiff asked that a temporary injunction issue pending trial of the case, enjoining appellant and others from withdrawing funds from the foundation, from executing any contracts affecting certain lands, and other injunctive relief, and that on final hearing the court enter its declaratory judgment that Lytton and Jacob S. Floyd were the only legal members of the foundation; that defendants Gregory and Grace be required to file an accounting with the court and to return to the defendant foundation any assets received by them as a result of undue influence practiced by them on Mrs. East, and other relief. Thereafter, various answers, cross-actions, amended pleadings, and petitions of intervention were filed in said case by various parties, some of them seeking relief similar to that asked by plaintiff Lytton. The temporary injunctive relief prayed for was granted by the court, and the temporary injunction was continued from time to time. As a result of motions to strike, the plea of intervention filed in said cause by Raul Trevino et al., was stricken and dismissed from said cause, and

the defendants in intervention, Alice National Bank, Edgar Turcotte and Jacob S. Floyd as Executors of the Estate of Sarita K. East, deceased, were dismissed from said suit insofar as said petition in intervention was concerned. An appeal therefrom was taken by Raul Trevino et al., and the Waco Court of Civil Appeals dismissed such appeal on the basis that it was not an appeal from a final judgment. *Kimmel v. Lytton*, Tex.Civ.App., 371 S.W.2d 927 (1963, writ ref'd).

On September 1, 1964, the trial court entered the order from which appellant sought a bill of review. The order recites that all parties to such action have approved the judgment, and on such judgment under the heading "Approved as to Form and Substance" is found the signature of appellant, Christopher Gregory, together with the signatures of other parties and attorneys in said cause. The order decrees certain people, not including appellant, to be the present and only legally authorized and elected members, directors, and officers of The John G. and Marie Stella Kenedy Memorial Foundation; confirms and ratifies certain amendments to the Articles of Incorporation of such Foundation; vacates and dissolves temporary restraining orders theretofore issued; enjoins and restrains all parties from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any money or royalties heretofore or hereafter received by the Foundation under three instruments described in such order, with certain exceptions as to payment of taxes, etc.; dismisses various parties to the suit; recites that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, as a result of which the parties hereto have refrained from executing and delivering an assignment of a production payment in oil, gas and other minerals in certain lands, from the John G. and Marie Stella Kenedy Memorial Foundation to the Sarita Kenedy East Foundation, Inc., a copy of which instrument is attached to the judgment as an Exhibit, and the proper

parties are authorized to execute, acknowledge, and deliver such assignment upon the vacation or avoidance of such temporary injunction hereinabove provided for. Said judgment further recites: "This is an interlocutory order and shall remain in full force and effect until further ordered by this Court," and provides that "All costs of suit shall abide the issue."

Appellant contends that the judgment of September 1, 1964, did dispose of all issues and parties in the case; that the injunction and order authorizing and directing a future act were merely incidental to the main relief granted; that the word "interlocutory" as used in such judgment was merely intended to show that the injunction therein issued was temporary in nature and would be dissolved by further order of the court when no longer necessary; that the mere fact that disposition of costs remain to be determined does not prevent a judgment from being final; and that evidence aliunde the judgment and pleadings in such cause is not determinative of the finality of such judgment. Appellant cites a number of cases in support of his contention, but, insofar as we have been able to ascertain, none of such cases involved an agreed judgment and in none of them was it expressly stated by the trial court that the judgment was interlocutory.

Appellees contend that the judgment was not final because: (1) It was expressly stated otherwise in such judgment. (2) The order was interlocutory in its nature. (3) Further action of the court of some kind or character is contemplated and actually indispensable. (4) The costs of suit were left open and not taxed or paid. (5) The court itself, in addition to signing the order containing the language that it was interlocutory, made a docket entry indicating that the order was interlocutory and not final. (6) The clerk of the court continued to carry such case as an active case and not as a case closed by final judgment. (7) Some of the parties to such suit continued

to file additional pleadings and other papers in said cause after the entry of the judgment. (8) The order standing alone is interlocutory in nature, but that such order expressly refers to a collateral settlement agreement which should be approved and judgment entered in accordance with such settlement agreement, which was admitted into evidence as an exhibit, makes the judgment in Cause No. 12074 contingent on the results of the will contest in Kenedy County, and when such judgment of September 1, 1964, is construed with the collateral agreement it is obvious that the judgment under attack is interlocutory and not final.

[1] The general rule is that a judgment to be final must dispose of all issues and parties in a case. *North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex. Sup. 1966); *Hargrove v. Insurance Inv. Corp.*, 142 Tex. 111, 176 S.W.2d 744 (1944). But, as stated by Justice Calvert in *North East v. Aldridge*, supra, "The rule is deceiving in its apparent simplicity and vexing in its application." In 4 *McDonald, Texas Civil Practice* § 17.03 (1950), it is stated: "There is a great body of precedent upon the difficult question of whether a particular decision of the court represents a 'final' or an 'interlocutory' judgment. * * * It thus frequently becomes a problem in construction to determine whether the particular decision was 'final' for the purpose of the question before the court. This problem must be resolved by a determination of the intention of the court gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties."

It appears clear that the court intended that such judgment be interlocutory, because not only does it expressly state so in such judgment, but in the judgment dismissing appellant's bill of review in the case on appeal the trial court makes findings, among others, that it was the intention of the parties and the court to enter a temporary order; that "The word 'interlocutory' contained

in the temporary order entered in Cause No. 12,074 was used with cautious and deliberate design;" that by said wording the temporary order entered in said cause was expressly made interlocutory in its entirety.¹ As to the

¹ Other findings made by the court were: "(1) that at the time the temporary order was entered there was pending a contest of the Last Will and Testament of Sarita K. East, Deceased, being Cause No. 348 (hereinafter called the 'will contest') on the docket of the County Court of Kenedy County, Texas; (2) that the parties and this court in Cause No. 12,074 clearly recognized that the outcome of the will contest might substantially affect Cause No. 12,074 because the Last Will and Testament of Sarita K. East, Deceased, under attack in said will contest, devises and bequeaths her residuary estate to The John G. and Marie Stella Kenedy Memorial Foundation (hereinafter called the 'Foundation'); (3) that because the will contest involved assets of Sarita K. East, Deceased, which may, or may not be, ultimately administered by the Foundation, neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in said Cause No. 12,074; (4) that at the time the temporary order was entered there was also pending a suit to set aside certain inter vivos deeds from Sarita K. East, Deceased, to the Foundation, the same being Cause No. 85, styled Arnold R. Garcia vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al. on the docket of the District Court of Kenedy County, Texas, 105th Judicial District (hereinafter called the 'deed suit'); (5) that the parties and this Court in Cause No. 12,074 recognized that the outcome of the deed suit might substantially affect Cause No. 12,074 because said deed suit involves a substantial portion of the Foundation assets; (6) that consequently neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in Cause No. 12,074, due to the bearing of the deed suit upon said Cause No. 12,074; (7) that there existed the possibility of a number of issues or the entire action in Cause No. 12,074 being rendered moot if Plaintiffs in both the will contest and the deed suit were successful; (8) that the parties in Cause No. 12,074, intended to enter a temporary order which may become a final judgment in the event Plaintiffs in both the will contest and the deed suit are unsuccessful, but the parties in Cause No. 12,074 did not intend to provide for alternative judgments based upon other possible results in the will contest and the deed suit; (9) that although the temporary order entered in Cause No. 12,074 might lead to a final judgment, the outcome in the will contest and deed suit must first be known;

intentions and conduct of the parties, such judgment or September 1, 1964, recites that all parties to such action have approved the same, and the judgment contains the signatures of appellant and other parties and attorneys in such suit. The record reflects that the court made a docket entry that such order was interlocutory; that on the docket of such court said case was continued to be carried as an active case, and after the date of such judgment there were entries made on different occasions, such as "passed," and that some of the parties continued to file additional pleadings in the case.

[2] This Court in *Culicchia v. Taormina*, Tex. Civ. App., 332 S.W.2d 803, 804 (1960, no writ), stated:

"In determining whether the judgment was a final one, we are limited largely to what the court stated by the judgment, and what might have been or could have been done is not the issue. There may be more than one way to write a judgment in an accounting suit, but we need only to determine what was done in this case.

"The judgment was carefully drawn and shows painstaking care in disposing of complex accounting

(10) that it was the intention of the parties and the Court to enter a temporary order only in Cause No. 12,074 because of the various contingencies herein described; (11) that the settlement agreement executed by the parties and the agreed temporary order entered pursuant thereto in Cause No. 12,074 recognizes the possible effect which the will contest and the deed suit might have on any future final judgment in Cause No. 12,074 included in the temporary order a temporary injunction enjoining the parties from 'disposing of, dissipating, removing from the territorial limits of the State of Texas, or spending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees and representatives * * *,' which temporary injunction is still in full force and effect; (13) that the court therefor provided in its temporary order in said Cause No. 12,074, that all costs of suit would not be taxed until every entry of final judgment; and (14) that some of the parties amended their pleadings subsequent to the entry of the temporary order in Cause No. 12,074, * * *."

problems. Throughout the judgment, the court makes rather clear what was intended, and while it is true that an instrument is what it is, without regard to the label appended to it, when a judgment contains words and internal evidences of its nature, we will not ignore them. * * *

See also the recent case of *State v. Starley*, 413 S.W.2d 451 (Tex. Civ. App.—Corpus Christi, 1967).

[3] In addition to the express statement in the judgment by the trial court to the effect that "This is an interlocutory order and shall remain in full force and effect until further ordered by this court," there are certain judicial acts to be performed by the trial court in said cause in the future. At some future date, it will be necessary for the trial court to act upon the temporary injunction provided for in such order, to assess all costs of suit, and to determine the effect of any change in the temporary injunction issued in the District Court of Kenedy County. See 33 Tex. Jur. 2d Judgments § 85 (1962).²

It is our opinion that appellees' counterpoint to the effect that the trial court correctly held that the judgment in Cause No. 12074 is interlocutory and not the subject to attack by Bill of Review and appellant's suit was properly dismissed, should be sustained. In view of such holding, we do not pass upon appellee Father Drury's

² "A final judgment is one that determines the rights of all the parties to the suit, and disposes of all the issues involved on their merits. Thus, a judgment is final where no further action adjudicating the rights of the parties may be taken by the court. But to constitute a final judgment it is not sufficient that the court has made a ruling that should logically lead to final disposition of the cause; the consequence of the ruling to the parties must be also declared. The very object of a suit is to adjudicate and declare respective rights so that the ministerial officers can with certainty carry the judgment into execution without the ascertainment of additional facts; where this is not the case the judgment is not final."

counterpoint that the Bill of Review of appellant is barred by limitation and laches.

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,
v. *Plaintiff*

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY,
LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE,
Attorney General of the State of Texas, and THE
ALICE NATIONAL BANK,
Defendants

AMENDED COMPLAINT
PARTIES

1. The plaintiff Christopher Gregory ("Gregory") is a citizen of the United States who resides in Massachusetts.

2. Defendant Thomas J. Drury ("Drury") is the Bishop of the Diocese of Corpus Christi of the Roman Catholic Church, and purports to be a member of the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation"). Drury resides at 620 Lipan Street, Corpus Christi, Texas.

3. Defendant Bruno R. Goldapp ("Goldapp") purports to be a member of the Foundation, and resides at 721 First Street, Alice, Texas.

4. Defendant Elena S. Kenedy ("Kenedy") purports to be a member of the Foundation and resides in Sarita, Texas.

5. Defendant Lee H. Lytton, Jr. ("Lytton") purports to be a member of the Foundation and resides in Sarita, Texas.

6. Defendant Kenneth Oden ("Oden") is a lawyer in Alice, Texas and purports to be a member of the Foundation. Oden resides in or near Alice, Texas.

7. Defendant Mark White ("White") is and has been since 1978, the Attorney General of the State of Texas, with an office in Austin, Texas. White resides in or near Austin, Texas.

8. Defendant Alice National Bank ("the Bank") is organized under applicable national banking laws with a principal place of business in Alice, Texas. The bank is the executor of the estate of Sarita Kenedy East.

JURISDICTION AND VENUE

9. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

10. Defendant Mark White, Attorney General of the State of Texas, resides in or near Austin, Texas which lies within this judicial district and division. Venue is therefore proper pursuant to 28 U.S.C. § 1392(a).

FACTUAL BACKGROUND

11. On or about January 22, 1960, Sarita Kenedy East ("East") established the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation"), a charitable foundation established under the Texas Non-Profit Corporation Act.

12. The documents which established the Foundation were drafted by East's attorneys in Houston, Texas, and were executed by East in their offices. East executed a will in which she left the bulk of her estate to the Foundation at the same time she executed the documents which established the Foundation.

13. East was the only member of the Foundation at the time of its establishment. Pursuant to the articles of incorporation of the Foundation, the members of the Foundation have full power to appoint the Foundation's directors.

14. Between January 22, 1960 and December 30, 1960, East executed a number of documents in which she purported to appoint additional members to the Foundation. In February, 1960, East named two additional members of the Foundation, Lytton and Jacob Floyd ("Floyd") (now deceased). Lytton and Floyd subsequently resigned from membership in the Foundation at East's request.

15. On December 30, 1960 East, who was then the only member of the Foundation, appointed Gregory the second member of the Foundation.

16. On February 11, 1961 East died, leaving Gregory the sole surviving member of the Foundation.

17. On or about April 19, 1961 Lytton filed suit in the 79th District Court of Jim Wells County, Texas, against Gregory and others, seeking to have Gregory removed from membership in the Foundation and to have himself reinstated as a member. Lytton alleged as reason for the action that Gregory had exercised undue influence over East, which resulted in his and Floyd's voluntary resignations from the Foundation.

COUNT I

18. Gregory repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 17 above.

19. Commencing in or about April, 1961 and continuing through June, 1981, the defendants White (and White's predecessors in the office of Attorney General of Texas), Drury (and Drury's predecessor Bishop Garriga, now deceased), Goldapp, Kenedy, Lytton, Oden and the

Bank (hereinafter referred to collectively as "the defendants"), along with Floyd, Robert K. Jewett ("Jewett") and Denman Moody ("Moody"), both of whom are lawyers in Houston, Texas, and others whose identities are presently unknown to Gregory, combined and conspired for the common purpose of depriving Gregory of his right to trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and his right to trial by jury, guaranteed by Texas law.

20. In furtherance of the conspiracy described in paragraph 19 above, the defendants, individually and jointly, along with their co-conspirators, have undertaken a course of conduct which included the following actions:

(a) On or about April 19, 1961, Lytton, in combination with others, filed a lawsuit in a state court of Texas against Gregory and others, which was without foundation and which was brought in bad faith. Lytton alleged that Gregory had exercised undue influence over East, causing her to request Lytton's resignation from the Foundation. In accordance with Texas law, White's predecessor in the office of Attorney General of Texas was made a party to the lawsuit. On information and belief, Lytton brought this lawsuit not intending to prosecute it, but for the purpose of coercing Gregory into resigning from the Foundation and naming Lytton in his place. Several months after initiation of the lawsuit, Gregory retained a lawyer in Washington, D.C., William R. Joyce, Jr. ("Joyce"), to represent him in connection with that lawsuit.

(b) Soon after initiation of the lawsuit, the defendants and their co-conspirators further sought to exercise coercion, duress and undue influence upon Gregory through his position as a member of the Order of Cistercians of the Strict Observance, also known as the Trappists, in an attempt to force Gregory to accede to their wishes. On information and belief, they caused Gregory to be threatened by his religious superiors with excommunica-

tion from the Roman Catholic Church and expulsion from the Trappist Order, if he did not give up his position as a member of the Foundation without a trial on the merits of the lawsuit against him.

(c) In the spring of 1962, Gregory was called to a meeting in Philadelphia by his religious superiors where he was told to discharge Joyce as his counsel, and to accede to the defendants' demands. On information and belief, the defendants and their co-conspirators had induced Gregory's religious superiors to hold this meeting and to order Gregory to cooperate. Gregory refused to give up his right to be a member of the Foundation and his right to a trial of the charges against him.

(d) The defendants and their co-conspirators continued to exercise coercion and duress upon Gregory. Finally, in May, 1962, Gregory signed a resignation from the Foundation as a result of the orders of his religious superiors. Gregory knew, however, that the resignation would not become effective until it was accepted by a vote of the Foundation's directors, of which he was one.

(e) The defendants and their co-conspirators demanded that Gregory also enter into a settlement agreement which would resolve the pending litigation without trial on the merits. Gregory refused to consent to the proposed settlement. In an effort to coerce Gregory into consenting, on information and belief, the defendants caused him to be sent to a monastery in Chile in the winter of 1963 where he would be unable to contact his counsel and would be more susceptible to their coercion.

(f) While in Chile, Gregory revoked the resignation which he had signed in May, 1962 but which had never been made effective by action of the Foundation's directors. Gregory sent his written revocation of resignation to his counsel, who filed it with the Texas court and sent a copy to Oden's partner, Floyd.

(g) The defendants and their co-conspirators continued to seek Gregory's consent to a settlement of the lawsuit through their course of coercion. As a result of their continued efforts, Gregory's will was eventually overcome and he signed, in September, 1963 in Chile a settlement agreement urged by the defendants. He signed that agreement only conditionally, however, with a written statement of the conditions upon which he consented attached to the agreement.

(h) Several months after Gregory's conditional consent to the settlement, Gregory was ordered by his religious superiors to a meeting in Miami, Florida attended by Jewett, Oden and others of the defendants and their co-conspirators, as well as by Gregory's religious superior. At that meeting, in January, 1964, the defendants and their co-conspirators requested Gregory's further cooperation, and presented him with a new resignation and a power of attorney to sign. Despite threats by his religious superiors of excommunication from the Roman Catholic Church and expulsion from the Trappist Order if he did not sign, Gregory reasserted his own will and refused. In addition, Gregory orally revoked whatever conditional consent to the settlement he had previously given, and stated that Jewett was not authorized to represent his interests in any way.

(i) In June, 1964, Gregory was sent to a monastery in northern Canada which was even more remote than the monastery in which he was located in Chile. On information and belief, the defendants caused his relocation to Canada for the purpose of bringing even more duress and coercion to bear upon him. He was instructed by his religious superiors to speak to no one, including his attorney, Joyce, about the lawsuit while there.

(j) Despite Gregory's clear indication of his lack of consent to the settlement and his refusal to cooperate with the defendants, the defendants and their co-conspirators continued their attempts to overcome Gregory's will

and desires. As a result of the demands of his religious superiors, Gregory signed a memorandum prepared by others for his signature in July, 1964, addressed to his Abbott, Thomas Keating ("Keating"), in which he attempted to reconcile his refusal to cooperate with the defendants with his religious conscience.

(k) In late August, 1964, while Gregory was living in isolation in Canada and was not being informed about the progress of the litigation in Texas, Keating requested from Gregory his further cooperation with the settlement. On information and belief, this request by Keating was made at the instance of the defendants and their co-conspirators. Gregory reasserted his own will and refused to agree with the settlement. Nevertheless, on the advice of the defendants and their co-conspirators, Keating, purporting to act on behalf of Gregory but without authority to do so, sent a telegram on August 30, 1964 to Jewett assenting to the settlement.

(l) On September 1, 1964, at the request of the defendants and their co-conspirators, the trial court in Texas held a hearing at which the defendants and their co-conspirators represented to the trial judge that a settlement of the dispute had been reached. Neither Gregory nor his attorney, Joyce, had any notice of this hearing, and neither was present. At the hearing, Jewett, acting on behalf of the defendants and their co-conspirators, made the following representations to the court:

1. That Gregory's May, 1962 resignation from the Foundation was valid and effective. In fact, that resignation had been revoked in writing in September, 1963, which the defendants and their co-conspirators well knew.
2. That Gregory's alleged consent to the settlement terms was valid and unconditional. In fact, Gregory's consent, which had been only conditional when given, had been expressly revoked,

which the defendants and their co-conspirators well knew. In addition, certain terms of the alleged settlement agreement had been altered.

3. That the telegram from Keating, purporting to act on Gregory's behalf, to Jewett constituted the exercise of a valid and effective power of attorney, when the defendants and their co-conspirators knew that Gregory had repeatedly refused to sign a power of attorney and had not intended to empower Keating to give one on his behalf.
4. That Jewett represented Gregory's interests in the litigation, when Jewett, the defendants and the other co-conspirators knew that Gregory was represented by Joyce and that Gregory explicitly denied that Jewett was his lawyer.

(m) The defendants and their co-conspirators scheduled the hearing before the trial court for September 1, 1964 with the knowledge that Gregory could not be present because of his isolation in Canada. Moreover, they did not notify Gregory or his attorney, Joyce, of the hearing to insure that neither was present. Their purpose was to insure that the settlement agreement was confirmed as a judgment, and to insure that Gregory was not afforded a trial on the merits. Gregory's physical absence from the proceeding was necessary for the defendants to effect their scheme and bind him by judicial decree to a settlement to which he had not consented.

(n) Throughout the course of the litigation in the Texas state courts described above, White's predecessor in the office of Attorney General of Texas was obliged by state law to represent the public interest in that lawsuit, and was bound by his office to act in accordance with law. White's predecessor wholly failed and neglected to represent the public interest in that lawsuit. Moreover, on information and belief, White's predecessor approved

of the alleged settlement, which approval was required by law, for the improper and unlawful reason of insuring that all Foundation funds would be distributed in Texas instead of in accordance with the wishes of the foundress.

21. As a result of the conduct of the defendants and their co-conspirators described in paragraph 20 above, the trial court entered an interlocutory judgment on September 1, 1964 incorporating in full the terms of the alleged settlement agreement, without any trial on the merits or by jury.

22. Subsequent to the entry of the September 1, 1964 judgment, the defendants and their co-conspirators have resisted Gregory's attempts to reveal his lack of consent to the court, to vacate that judgment, and to obtain a trial on the merits and by jury. Among the actions of the defendants and their co-conspirators are the following:

(a) The defendants and their co-conspirators continued to exercise coercion, duress and undue influence on Gregory by causing him to continue to be threatened by his religious superiors with excommunication from the Roman Catholic Church and expulsion from the Trappist Order if he sought to upset the interlocutory judgment. Gregory nevertheless attempted to have that judgment vacated. Gregory was thereafter dismissed from the Trappist Order in March, 1966, as a result.

(b) In 1979, after resolution of a contest over the validity of East's will which caused the September 1, 1964 judgment to be interlocutory, White, acting on behalf of the defendants and their co-conspirators, requested that the trial court make the interlocutory judgment final and binding upon Gregory, despite the fact that Gregory contended that he had never consented to the settlement agreement, which White and the other defendants well knew, and despite their knowledge that Gregory did not consent at that time. White, by failing

to undo the wrong caused the public in and prior to 1964, perpetuated that wrong in violation of his duty under law.

(c) As a result of the actions of the defendants and their co-conspirators, the trial court made the interlocutory judgment final and binding on November 28, 1979 without any trial by jury or otherwise, on the merits of the complaint.

(d) The defendants and their co-conspirators continued to resist Gregory's efforts to obtain review of the judgments against him through June 15, 1981.

23. The conduct of the defendants and their co-conspirators described in paragraphs 20 and 22 above was undertaken for the purpose of depriving Gregory of the rights to trial and to trial by jury on the charges of undue influence brought against him by Lytton.

24. The conduct of the defendants and their co-conspirators described in paragraphs 20 and 22 above resulted in the deprivation of Gregory's rights to trial and to trial by jury, as the defendants and their co-conspirators intended.

25. As a result of the conduct of the defendants and their co-conspirators, Gregory has been wrongfully excluded from his position as a member of the Foundation and has been wrongfully prevented from directing use of the funds of the Foundation in accordance with East's desires as he should determine them.

26. The conduct of the defendants violates the Fifth and Fourteenth Amendments to the United States Constitution, as well as Texas law.

COUNT II

27. Gregory repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 17 and 19 through 25 above.

28. White and his predecessors in office, as Attorneys General of the State of Texas, were acting under color of state law in actively participating in the combination and conspiracy described in paragraphs 19 through 22 above, with knowledge that their actions were likely to result in the deprivation of Gregory's constitutional rights.

29. The conduct of the defendants violates 42 U.S.C. § 1983.

WHEREFORE, the plaintiff Christopher Gregory requests that the Court, after trial, enter judgment in his favor and order the following relief:

1. Enjoin the defendant Alice National Bank and the defendants who purport to be members of the Foundation from disbursing, conveying or distributing any funds of the estate of Sarita Kenedy East or of the Foundation;

2. Order an audit of the defendant Alice National Bank and a full accounting from the Bank and from the defendants who purport to be members of the Foundation of all funds of the estate of Sarita Kenedy East and of the Foundation from February 11, 1961 through the present;

3. Order the defendants to resign as members and directors of the Foundation and to appoint Gregory as sole member as their successor;

4. Order the defendant Mark White, Attorney General of Texas, to approve on behalf of the State of Texas, the resignations of the defendants from the Foundation and the appointment of Gregory, as sole member, as is required under Texas law to effect such a change in the Foundation articles;

5. Award him the costs of this action; and

6. Such other and further relief as the Court deems just and proper.

THE PLAINTIFF DEMANDS A TRIAL BY JURY
TO THE FULL EXTENT TO WHICH HE IS EN-
TITLED BY LAW.

Dated: March 30, 1982

CHRISTOPHER GREGORY

By his attorneys,

/s/ (orig. signed)

JAMES D. ST. CLAIR, P.C.
BARBARA L. MOORE
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100

Of Counsel:

/s/ (orig. signed)

JAMES R. WEDDINGTON
FRIEDMAN, WEDDINGTON AND HANSEN
515 Stewart Title Building
812 San Antonio Street
Austin, Texas 78701

APPENDIX H

REPUBLIC OF CHILE)
PROVINCE AND CITY OF SANTIAGO)
EMBASSY OF THE UNITED STATES) ss
OF AMERICA)

THIS IS TO CERTIFY THAT I first met Brother Leo Gregory, o.c.s.o. in August 1963 in Santiago de Chile. At that time he was residing at the Trappist Monastery in Las Condes. He came to me seeking advise as to his obligations as a religious faced with certain commands given him by his Superiors in reference to a civil law-suit in Texas involving the Kenedy Memorial Foundation, of which he was both a Member and Director. In 1962 an Apostolic Visitor had been appointed by the Holy See in an effort to settle this dispute.

I recall that in September 1963, Brother Leo told me that he had received orders from both the Apostolic Visitor and his Superior in Spencer, Massachusetts to sign a settlement relating to the law-suit. At the same time he was also ordered to sign a resignation as Member and Director of the Foundation.

Brother Leo discussed this situation with me at great length, asking my advice as to how he should respond to these orders from his Superiors. He told me that he was told that he would be dismissed from his Order if he failed to comply. I advised Brother to sign the settlement alone, but that instead of sending it back to the attorneys in New York as he had been instructed to do, to have it forwarded by hand to the Holy See along with a covering letter in which he would explain his position of conscience. Accordingly, Brother Leo drafted a several page letter addressed to the Holy See in which he set forth the reasons why in conscience he could not accept to the terms of the settlement. He showed me the final draft of the letter, which I read carefully. Then he signed both the settlement and the covering letter in my

presence and gave them to me. I placed them in an envelope, and sent them to the Holy See.

In the covering letter, Brother Leo explained that he had been ordered by his Superiors to execute a settlement and sign a resignation from Mrs. East's Foundation. He went on to say that the settlement was clearly contrary to Mrs. East's wishes, and that therefore he could not in conscience agree to it. However, in view of the fact that he had been ordered to sign this settlement by the Apostolic Visitor, he was doing so but was sending it along with the covering letter to the Holy See asking that the settlement not be released to the civil court in Texas *unless* the Holy See in writing, took the full responsibility to change the Will of Mrs. East. In other words, Brother Leo's signature on the settlement was to be regarded as being conditioned upon a subsequent act of the Holy See, provided the Holy See was willing to assume the responsibility to alter the clearly expressed wishes of Mrs. East. In thus way, Brother Leo felt that he was able to discharge his obligations both to the Apostolic Visitor and to his conscience.

Subscribed and sworn to before me
this 14th day of June, 1966.

/s/ José Aldunate Lyon
REV. JOSE ALDUNATE LYON

/s/ John B. Barbadoro, Jr.
Vice Consul of the United States
of America

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,
Plaintiff

v.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY,
LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE,
Attorney General of the State of Texas, and THE
ALICE NATIONAL BANK,
Defendants

AFFIDAVIT OF MARSHALL BOYKIN, III

I, Marshall Boykin, III hereby under oath depose and state:

1. I am a member of the Bar of the State of Texas and practice law with the firm of Wood, Boykin, Wolter, Smith and Hatridge, 2000 First City Bank Tower, Corpus Christi, Texas. I submit this affidavit in support of the plaintiff's opposition to the defendants' Motion for Judgment on the Pleadings and in support of the plaintiff's Motion for Preliminary Injunction.

2. In late 1964 I was the first retained to represent Christopher Gregory ["Gregory"], also known as Brother Leo, the plaintiff in this action, in connection with certain litigation in which he was a defendant in the Texas state courts. I continued to represent Gregory until early 1980.

3. I understand that the defendants in this lawsuit contend that a hearing before the District Court for the 79th Judicial District of Jim Wells County, Texas on September 21, 1979 was a "trial." That proceeding was not, however, a trial but was instead a hearing on certain motions.

4. Attached hereto and marked "A" through "D" are copies of the documents I received prior to the hearing which constitute the only notice I received regarding that hearing on behalf of Gregory. I initially learned on August 6, 1979 that the hearing was scheduled for August 10, 1979. The hearing was subsequently postponed first to August 31, 1979 and later to September 21, 1979. The notice I received was of a hearing on the defendants' Motion for Entry of Final Judgment and Motion to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment. I had no notice of a trial and no notice that I should bring witnesses prepared for a trial.

5. On September 21, 1979 I appeared without witnesses to argue the merits of the defendants' motions. My client attended the hearing with me but was not prepared to testify. I objected on the record at the hearing on numerous occasions to the introduction of testimony and documentary evidence, on the grounds that I had no notice of a trial and therefore no opportunity to prepare for a trial.

/s/ (original signed)
MARSHALL BOYKIN, III

Dated: March 16, 1982

Signed and sworn to before me this, the 16th day of March, 1982.

/s/ (original signed)
Notary Public
My commission expires: 9-20-84

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12074

LEE H. LYTTON, JR.

vs.

THE JOHN G. and MARIE STELLA KENEDY
MEMORIAL FOUNDATION, *et al.*

ORDER

BE IT REMEMBERED that on the 24th day of July, 1979, came on to be heard the Honorable Mark White, Attorney General of the State of Texas, by law a necessary part to this litigation, and Thomas M. Dolye, John J. Meehan and J. Peter Grace, some of the Defendants in the above-styled and numbered cause, in their Motion for the Entry of Final Judgment and Motion to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment, and it being the opinion of the Court that said Motions are meritorious, it is therefore,

ORDERED that said Motions be set for hearing on the 10th day of August, 1979, at 11 o'clock P.M.

SIGNED and ENTERED on this 24th day of July, 1979.

/s/ (original signed)
Judge Presiding

"A"

WESTERN UNION MAILGRAM

Middletown, Va. 22649

4-035697S218 08/06/79 ICS IPMBNGZCSP CP CA
7136690880 MGM TDBN HOUSTON TX
150 08-06 0112P EST

Francis Marshall Boykin III
2000 Corpus Christi Bank & Trust Tower
Corpus Christi TX 78477

This mailgram will confirm a letter of separate cover indicating resetting of hearing on joint motion of the Honorable Mark White, Attorney General for the State of Texas and the Sarita Kennedy East Foundation for the entry of final judgment in the cause entitled Lee H/ Lytton, Jr et al. versus The John G. and Marie Stella Kennedy Memorial Foundation et al. The hearing is set for August 31, 1979 at 11 AM and is to convene at the Jim Wells County Court House in Alice, Texas.

cc: Cahill Gordon & Rindel, Attn Dennis McInerney
80 Pine St New York NY 10005

cc: Ms Francie A. Frederick, Assistant Attorney General, State of Texas, Charitable Trust Section, State and County Divn Supreme Court Bldg
PO Box 12548 Austin Texas 78711

Larry Watts, co-counsel for defendant, Sarita Kennedy East Foundation

1317 EST

MGMCO MP MGM

"B"

WESTERN UNION MAILGRAM

Law Offices Larry Watts
2325 University
Houston TX 77005

4-065859S218 08/06/79 ICS IPMB NGZ CSP CPCB
7136690880 MGM TDB N HOUSTON TX
111 08-06 0457P EST

Francis Marshall Boykin III
2000 Corpus Christi Bank and Trust Tower
Corpus Christi TX 78477

This mailgram will confirm a letter of seperate cover indicating notice of hearing on joint motion of the Honorable Mark White, Attorney General for the State of Texas and the Sarita Kenedy East Foundation for the entry of final judgment in the cause entitled Lee H. Lytton, Jr at all. vs the John G. and Marie Stella Kenedy Memorial Foundation, at all. The hearing has been reset for September 21, 1979 at 11:00AM and is to convene at the Jim Wells County Courthouse in Alice Texas.

Larry Watts co-counsel for defendant Sarita Kenedy East Mem Foundation

1702 EST

MGMCOMP MGM

"C"

LAW OFFICES OF LARRY WATTS, P. C.
2325 University Blvd.
Houston, Texas 77005
713/669-0880

April 7, 1979

Homer Dean
P.O. Box 150
Alice, Texas 78332

Francis Marshall Boykin, III
2000 Corpus Christi Bank & Trust Tower
Corpus Christi, Texas 78477

Cahill, Gorden & Reindel
Attn: Denis McInery
Eighty Pine Street
New York, New York 10005

Re: Lee H. Lytton, Jr. vs. The John G. and Marie Stella
Kenedy Memorial Foundation, et al; Cause No.
12074

Gentlemen:

Enclosed please find copies of the Motion to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment, Motion For the Entry of Final Judgment and Supporting Memorandum as filed by the Honorable Mark White, Attorney General of the State of Texas and Thomas M. Doyle, John J. Meehan, and J. Peter Grace as some of the several Defendants in the above styled and numbered cause.

Also please find a copy of the Order of July 24, 1979, setting a hearing on the aforementioned Motions. This will serve as official notice that said hearing has been re-set for September 21, 1979, at 11:00 a.m. at the

"D"

County Courthouse for Jim Wells County. Thank you for your attention to this matter.

Sincerely,

/s/ Harris Butler
HARRIS BUTLER
Law Clerk for
Larry Watts

encl.

cc: District Clerk for Jim Wells County
Alice, Texas 78332

Alice National Bank, Independent
Executor for Estate of Sarita K.
East, Deceased
P.O. Drawer 1790
Alice, Texas 78332

The John G. & Marie Stella Kenedy
Memorial Foundation
P.O. Drawer 331
Alice, Texas 78332

Mr. Kenneth Oden, Jr.
P.O. Drawer 331
Alice, Texas 78332

Mr. B.R. Goldapp
Alice National Bank
P.O. Drawer 1790
Alice, Texas 78332

The Attorney General for the
State of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Mr. Lee H. Lytton, Jr.
Sarita, Texas 78385

Most Reverend Thomas J. Drury
Bishop of the Diocese of
Corpus Christi
620 Lipan Street
Corpus Christi, Texas 78401

Mrs. Elena Kenedy
Sarita, Texas 78385

Denman Moody
P.O. Box 2558
Houston, Texas 77001

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,
Plaintiff

v.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY,
LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE,
Attorney General of the State of Texas, and THE
ALICE NATIONAL BANK,

Defendants

AFFIDAVIT OF WILLIAM R. JOYCE, JR.

I, William R. Joyce, hereby under oath depose and state:

1. I am a member in good standing of the Bars of the State of New York and the District of Columbia, and am engaged in the practice of law in Washington, D.C. I submit this affidavit in support of the plaintiffs' opposition to the defendants' Motion for Judgment on the Pleadings and in support of the plaintiff's Motion for Preliminary Injunction.

2. In approximately November, 1961 I was first retained to represent Christopher Gregory, the plaintiff in this lawsuit, who is also known by the religious name Brother Leo. At that time, he was a defendant in a lawsuit in the Texas state courts in which it was alleged that he exercised undue influence over Sarita Kenedy

East in bringing about his appointment as sole member of the John G. and Marie Stella Kenedy Memorial Foundation, of which Mrs. East was founder. I continued to represent Mr. Gregory until approximately late 1964 or early 1965 in connection with that litigation, at which time Marshall Boykin, III took over as Mr. Gregory's lawyer.

3. During the years 1961 through 1964, I had numerous occasions to discuss the course of the Texas litigation and my client's position in that litigation with other attorneys involved. I specifically recall numerous conversations and correspondence with Kenneth Oden, a defendant in this lawsuit, and his partner Jacob Floyd (who is now deceased), and several conversations with Denman Moody and Robert Jewett, both of the firm of Baker and Botts in Houston, Texas. All of these lawyers were well aware that I represented Brother Leo in connection with the Texas litigation during that time period.

4. During the summer of 1964, I had several conversations and correspondence with Mr. Oden in which I asked him about the status of the Texas litigation. At no time did Mr. Oden inform me that a hearing has been scheduled for September 1, 1964. In fact, I had written to Mr. Oden on August 31, 1964, to which he responded on September 3, 1964, without any mention of the September 1, 1964 hearing, despite the fact that he knew I represented Mr. Gregory. A copy of Mr. Oden's response to me from my files is attached hereto and marked "A".

5. I learned only through a report in *The New York Times* that the September 1, 1964 hearing had been held and that a purported settlement agreement had been filed with the Texas court. I subsequently discovered that Robert Jewett had purported to act on behalf of my client, Mr. Gregory, at that hearing and in tendering Mr. Gregory's resignation from the Foundation. A copy of the minutes of a special meeting of the Foundation, held on September 1, 1964 for the purpose of accepting the

purported settlement agreement and Mr. Gregory's purported resignation from the Foundation is attached hereto and marked "B".

6. The minutes attached as exhibit "B" show that Mr. Jewett purported to represent Mr. Gregory at the meeting, and that Mr. Oden accepted Mr. Jewett's actions as secretary of the Foundation. The minutes also show that Mr. Jewett purported to tender Mr. Gregory's resignation from the Foundation at that time, which Mr. Oden accepted as secretary of the Foundation. I was shocked to learn of these actions since both Mr. Jewett and Mr. Oden had to have known that I represented Mr. Gregory. In addition, I am certain that they knew that Mr. Gregory had revoked the only resignation from the Foundation he had ever signed, because I sent Mr. Oden's partner a copy of that revocation myself. Attached hereto and marked "C" is a copy of my letter to Mr. Floyd and the enclosed resignation.

7. I thereafter attempted to remedy the misrepresentations made on September 1, 1964, and initially wrote to Mr. Oden on December 9, 1964 and then to Lawrence McKay, the New York counsel who had retained Baker and Botts as their local counsel, on December 11, 1964. Copies of those letters are attached and marked "D" and "E". Mr. McKay indicated to me in no uncertain terms that he intended to do nothing regarding the impropriety of the September 1, 1964 hearing. A copy of his response to me is attached and marked "F".

/s/ (Original signed)

WILLIAM R. JOYCE, JR.

Dated:

Signed and sworn to before me this, the 19th day of March, 1982.

Notary Public

My commission expires:

90a

Law Offices
PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas
Code No. 78332

September 3, 1964

Mr. William R. Joyce, Jr.
Curtis, Mallet-Prevost, Colt & Mosle
Federal Bar Building
1815 H Street, N.W.
Washington, D.C.

Dear Mr. Joyce:

Many thanks for your letter of August 31st, 1964.

I will communicate with you at an early date regarding
the matters raised therein.

Yours very truly

PERKINS, FLOYD, DAVIS & ODEN

/s/ Kenneth Oden
KENNETH ODEN

KO/ml

cc: Mr. William R. Joyce, Jr.
63 Wall Street
New York, New York 10005

AIR MAIL

"A"

MINUTES OF SPECIAL MEETING OF THE
MEMBERS OF THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION

A meeting of the members of The John G. and Marie Stella Kenedy Memorial Foundation was held in the Jim Wells County Courthouse at Alice, Texas, on September 1st, 1964, at 2:30 o'clock P.M.

Present at the meeting were:

Most Reverend M.S. Garriga, Roman Catholic Bishop
of the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

B.R. Goldapp

Kenneth Oden

Robert K. Jewett, as proxy and attorney in fact for
J. Peter Grace and Christopher Gregory, sometimes
known as Brother Leo, O.C.S.O.

Kenneth Oden acted as Secretary of the meeting. A waiver of notice of the meeting executed by all of those present was delivered to the Secretary for filing with the minutes of the meeting.

The Secretary then tendered to the meeting a copy of a form of judgment, executed on behalf of all of the parties present at the meeting, and such form of judgment and its Exhibits was directed to be annexed to the minutes of this meeting as Exhibit A and placed in the minute book of the corporation.

The Secretary announced to the meeting that there had been heretofore filed with the Foundation the resignations of the following named persons in all capacities or offices which each, respectively, have at any time held or claimed in the Foundation, to-wit:

"B"

Reverend Patrick J. Peyton, C.S.C.

Henrietta K. Armstrong

Lawrence E. Wood

T.M. Doyle

John J. Meehan

Mr. Oden then stated that Messrs. Lee H. Lytton, Jr. and Jacob S. Floyd, through their execution of the form of the judgment presented to the meeting, had ratified their resignations dated June 13, 1960, as members of the Foundation. Mr. Oden advised that Mr. Floyd died on February 27, 1964, following his execution of the form of the judgment presented to the meeting. The Secretary was then directed by all persons present at the meeting to express to Mr. Floyd's family the appreciation of those present for the services rendered by Mr. Floyd on behalf of the Foundation and to convey to the members of his family the sympathy of those present.

Mr. Lee H. Lytton, Jr., then delivered to the Secretary of the meeting his resignation as a member of the Foundation.

J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo, O.C.S.O., acting through their proxy and attorney in fact, Robert K. Jewett, then voted to elect as members of the Foundation the following persons:

Most Reverend M.S. Garriga, Roman Catholic Bishop
of the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

B.R. Goldapp

Kenneth Oden

Christopher Gregory, sometimes known as Brother Leo, O.C.S.O., and J. Peter Grace, acting through their said proxy and attorney in fact, Robert K. Jewitt, and acting in conformity with the provisions of the form of the judgment presented to the meeting, tendered to the Foundation their respective resignations as members of the Foundation, which said resignations were accepted by the Secretary and the members of the Foundation present at the meeting, and were filed and directed to be retained in the corporate records of the Foundation.

The meeting then proceeded to the selection of a Chairman of the meeting, and Mrs. Elena S. Kenedy was selected and thereafter acted as Chairman of the meeting.

The Chairman stated that at the present time there were no directors of the Foundation, and that directors of the Foundation should be elected; whereupon, the following persons were duly elected as directors of the Foundation, to serve until the next annual meeting of the Foundation and thereafter until their successors shall have been elected and shall have qualified:

Most Reverend M.S. Garriga, Roman Catholic Bishop
of the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

B.R. Goldapp

Kenneth Oden

The Chairman then stated that attention should be given to the amendment of the Articles of Incorporation of the Foundation and presented to the meeting and asked the Secretary to mark for identification and file with the corporate records of the Foundation, a proposed form of such amendment to such Articles.

After a discussion of such proposed amendment to the Articles of Incorporation of the Foundation, the follow-

ing resolutions were duly offered and unanimously adopted:

RESOLVED: That the Articles of Incorporation of the Foundation be amended by adding thereto a new Article IX and a new Article X, reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

- (i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;
- (ii) at least two other practical Catholics;
- (iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent ($33\frac{1}{3}\%$) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article X of the Articles of Incorporation of the John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

RESOLVED: That the proper officers of this corporation are hereby authorized and directed to amend the Articles of Incorporation of this Foundation in the manner hereinabove set forth, and to file such amendment with the Secretary of State of the State of Texas, and to do and perform all such things as may be necessary and requisite to make such amendments to the Articles of Incorporation of this Foundation fully effective.

The Chairman then stated that the By-laws of the Foundation should be amended in certain respects, and submitted such proposed amendments to the By-laws of the Foundation to the meeting for consideration. After discussion of such proposed amendments to the By-laws, the following resolutions were duly offered and unanimously adopted:

RESOLVED: That Article III of the By-Laws of the Foundation is hereby amended to insert the following as paragraphs 1a, 1b and 1c thereof, to-wit:

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

- (i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;
- (ii) at least two other practical Catholics;
- (iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty per-

cent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent ($33\frac{1}{3}\%$) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable;

and paragraph 2 thereof is amended to insert at the beginning thereof the words "Subject to the foregoing provisions of paragraphs 1a, 1b and 1c hereof,".

RESOLVED: That there shall be added to the By-laws of the Foundation a new Article XI, reading as follows:

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable;

and the present Article XI of the By-Laws shall be re-numbered Article XII.

The Chairman then referred to the form of the judgment earlier presented to this meeting, and also presented to the meeting and referred to a certain order

dated January —, 1964, entered in Cause No. 85, District Court of Kenedy County, Texas, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation. She advised that such form of judgment provided for the conveyance by the Foundation to the Sarita Kenedy East Foundation, Inc., a non-profit charitable corporation organized and existing under the laws of the State of New York, of a production payment out of certain properties of the Foundation in the form of the assignment annexed as Exhibit C to such form of judgment. After consideration of the form of such assignment and such order, the following resolution was duly offered and unanimously adopted:

RESOLVED: That, subject to that certain order dated January —, 1964, in Cause No. 85, District Court to Kenedy County, Texas, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, the assignment by this Foundation to the Sarita Kenedy East Foundation, Inc., a New York non-profit corporation, of the production payment set forth in the form of conveyance attached as Exhibit C to the form of judgment presented to this meeting is hereby approved, and, upon the dissolution of such order the directors of this Foundation are hereby directed to authorize the execution and delivery of such conveyance.

There being no further business to come before the meeting, it was duly adjourned.

/s/ Kenneth Oden
Secretary

APPROVED:

/s/ Elena S. Kenedy
Chairman

98a

September 19, 1963

Washington, D.C. 20005

Mr. Jacob S. Floyd, Secretary
Kenedy Memorial Foundation
Alice National Bank Building
Alice, Texas

Dear Sir:

I am enclosing herewith the document I referred to in my telegram to you of September 7, 1963, namely the revocation of resignation by Brother M. Leo, O.C.S.O., also known as Christopher Gregory, as Member of the Kenedy Memorial Foundation.

Very truly yours

WILLIAM R. JOYCE, JR.

Enclosure
WRJ/cs

cc:

Major Tom [Illegible]
Clerk, District of [Illegible]

"C"

SAVE THIS RECEIPT. Present it when making inquiry or claim.

Claim must be filed within 1 year from the date of mailing.

Consult postmaster as to fee chargeable on registered parcel post packages addressed to foreign countries.

U.S. GOVERNMENT PRINTING OFFICE 048-16-70493-4

September 12, 1963.

I hereby revoke the Resignation that I signed during 1962, as Member of THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION. This Resignation was never filed with the Foundation in Alice, Texas, and as a consequence is not effective. By this action signed to-day it is revoked and becomes void.

Signed:

/s/ Christopher Gregory

REPUBLIC OF CHILE
PROVINCE AND CITY OF SANTIAGO
EMBASSY OF THE UNITED STATES OF AMERICA

Subscribed and sworn to before me this 12th day of
September, 1963.

/s/ Oscar R. Edmondson
OSCAR R. EDMONDSON
Vice Consul of the
United States of America

101a

December 9, 1964

Kenneth Oden, Esq.
Perkins, Floyd, Davis & Oden
P.O. Drawer 331
Alice, Texas 78332

Dear Mr. Oden:

I have reviewed the copy of the judgment in *Lytton v. Kenedy Memorial Foundation, et al* which you sent me. After careful study of same, I find it necessary to bring to your attention the enclosed copies of two documents which I feel quite strongly should be called to the Court's attention. In view of the terms of the settlement and the fact that my client left these documents with me and is incommunicado, I have a professional obligation to see that the Court is advised that Brother Leo did not freely agree to the terms of the settlement and that he was not represented by counsel of his own choice in connection therewith. I would appreciate, therefore, hearing from you as soon as possible on this matter.

Very truly yours,

WILLIAM R. JOYCE, JR.

Enc: 2

WRJ:lk

"D"

December 11, 1964

Lawrence J. McKay, Esq.
Messrs. Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, N.Y.

Dear Sir:

I am enclosing herewith a copy of a letter and its enclosures that I wrote on December 9, 1964 to Mr. Kenneth Oden in Alice, Texas in connection with the *Lytton v. Kenedy Memorial Foundation* case. In view of the representations made in the settlement submitted to the Court in Texas and the statements contained in the enclosures accompanying my letter to Mr. Oden, I would appreciate hearing from you as soon as possible on this matter.

Very truly yours,

WILLIAM R. JOYCE, JR.

Enclosures

WRJ:lk

"E"

CAHILL, GORDON, REINDEL & OHL
Eighty Pine Street
New York, N.Y.

Telephone Whitehall 4-7400

December 21, 1964

Dear Sir:

I acknowledge receipt of your letter of December 11, 1964 together with the enclosures referred to therein.

I note that you "feel quite strongly" that the two documents you refer to purportedly signed by Bro. M. Leo in one instance and by Christopher Gregory in the other, should be called to the Court's attention. I further note that you feel that you have "... a professional obligation to see that the Court is advised that Brother Leo did not freely agree to the terms of the settlement and that he was not represented by counsel of his own choice in connection therewith."

The reason you would appreciate hearing from me escapes me. I assume that you will implement your strong feeling and fulfill what you regard as your professional obligation.

Yours very truly,

/s/ Lawrence J. McKay
LAWRENCE J. MCKAY

William R. Joyce, Jr., Esq.
Curtis, Mallet-Prevost, Colt & Mosle
Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006

"F"

APPENDIX K

The Fifth Amendment to the United States Constitution provides in relevant part that:

No person shall . . . be deprived of life, liberty, or property, without due process of law;

The Fourteenth Amendment to the United States Constitution, Section 1, provides in part that:

No State shall . . . deprive any person of life, liberty, or property, without due process of law;

APPENDIX L

42 U.S.C. § 1983 provides in relevant part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

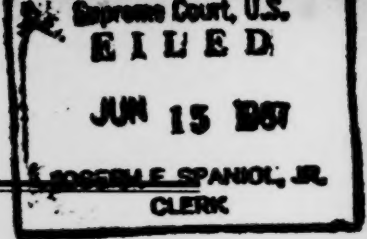
28 U.S.C. § 1738 provides in relevant part that:

The Acts of the legislature of any State, Territory, or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX M

Tex. R. Civ. P. 216 provides in relevant part that:

No jury trial shall be had in any civil suit, unless application be made therefor . . . on or before the appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance.



No. 86-1673

3

IN THE
Supreme Court of The United States

CHRISTOPHER GREGORY,

Petitioner,

v.

THOMAS J. DRURY, *et al.*,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO CHRISTOPHER GREGORY'S PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

HARRY J. SCHULZ*
Schulz & Schulz
P. O. Box 580
Three Rivers, Texas 78071
(512) 786-2545
Attorneys for Respondent
Thomas J. Drury

DAVIS GRANT*
R. Mark Dietz
1010 United Bank Tower
Austin, Texas 78701
(512) 474-1156
Attorneys for Respondent
Lee H. Lytton, Jr.

**Counsel of Record*
June 15, 1987

J. G. ADAMI, JR.*
Perkins, Oden, Warburton,
McNeill & Adami
P. O. Box 331
Alice, Texas 78333
(512) 668-8101
Attorneys for Respondents
Bruno R. Goldapp, Elena S.
Kenedy, Kenneth Oden and
The Alice National Bank

26/77

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In accordance with 28 U.S.C. § 1738, the Federal courts must give preclusive effect to a prior state court judgment where the new claim asserted under 42 U.S.C. § 1983 in a subsequent action between the same parties and requesting the same relief is entirely grounded upon and based upon the identical facts and issues which have already been asserted and fully adjudicated in prior state court actions and appeals from such state court actions to the United States Supreme Court.¹ (In reply to Petitioner's Questions 1 and 2)

2. There is no conflict in the decisions of the Fifth Circuit Court of Appeals and those decisions of the Seventh and Tenth Circuit Court of Appeals in their claim preclusion application under 28 U.S.C. § 1738 and 42 U.S.C. § 1983 to prior state court judgments. (In reply to Petitioner's Question 3)

¹ The factual basis and the issues raised by Petitioner, Gregory, in his action under 42 U.S.C. § 1983 have heretofore been presented to this court in No. 80-1677 in the United States Supreme Court, October term, 1980, styled Christopher Gregory v. Mark White, Attorney General of the State of Texas, et al. See Respondents' Joint Appendices, Appendix N, page 114a.

PARTIES IN THE COURT OF APPEALS

The parties in the Fifth Circuit Court of Appeals were the Petitioner, Christopher Gregory, and the Respondents, Thomas J. Drury, Bruno R. Goldapp, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth Oden, Mark White as Attorney General of the State of Texas, and The Alice National Bank.

Pursuant to Petitioner's Motion for Leave to File a Second Amended Complaint, which was never acted on by the United States District Court for the Southern District of Texas, Petitioner sought to update his Amended Complaint by naming as defendants the then current member of the John G. and Marie Stella Kenedy Memorial Foundation, Rene H. Gracida, Lee H. Lytton, Jr., E. B. Groner, Daniel Meaney and Sister Bernard Marie Borgmeyer, by substituting the then current Attorney General of the State of Texas, Jim Mattox, and retaining The Alice National Bank, Kenneth Oden and Thomas J. Drury as defendants.

TABLE OF CONTENTS

	<u>Page</u>
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
PARTIES IN THE COURT OF APPEALS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
COUNTER-STATEMENT OF THE CASE	
Preliminary Statement	3
History of Proceedings and Disposition in Court Below	4
Statement of the Facts	6
REASONS FOR DENIAL OF THE WRIT	14
1. In accordance with 28 U.S.C. § 1738, the Federal courts must give preclusive effect to a prior state court judgment where the new claim asserted under 42 U.S.C § 1983 in a subsequent action between the same parties and requesting the same relief is entirely grounded upon and based upon the identical facts and issues which have already been asserted and fully adjudicated in prior state court actions and appeals from such state court actions to the United States Supreme Court	14
2. There is no conflict in the decisions of the Fifth Circuit Court of Appeals and those decisions of the Seventh and Tenth Circuit Court of Appeals in their claim preclusion application under 28 U.S.C § 1738 and 42 U.S.C § 1983 to prior state court judgments	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Abbott Laboratories v. Gravis</i> , 470 S.W.2d 639, 642 (Tex. S. Ct., 1971)	15
<i>Allen v. McCurry</i> , 449 U.S. 90, 101 S. Ct. 411, 66 L.Ed. 2d 308 (1980).....	14, 16, 23, 25
<i>American Indemnity Company v. Fellbaum</i> , 263 S.W. 908 (Tex. S. Ct., 1924)	17
<i>Arnoff v. Texas Turnpike Authority</i> , 299 S.W.2d 342 (Tex. Civ. App., Dallas, 1957, no writ hist.)	20
<i>Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers</i> , 398 U.S. 281, 26 L.Ed. 2d 234, 90 S. Ct. 1739 (1970)	4
<i>Battieste v. Baton Rouge</i> , 732 F.2d 439 (5th Cir., 1984)	24
<i>Boileau v. Bethlehem Steel Corp.</i> , 730 F.2d 929 (3rd Cir., 1984)	26
<i>Bonniwell v. Beech Aircraft Corporation</i> , 663 S.W.2d 816 (Tex. S. Ct., 1984)	16
<i>Cavers v. Sioux Oil and Refining Co.</i> , 39 S.W.2d 862 (Comm. App., 1931)	17
<i>Childs v. Reunion Bank</i> , 587 S.W.2d 466 (Tex. Civ. App., Dallas, 1979, writ ref. n.r.e.)	20
<i>District of Columbia Court of Appeals v. Feldman</i> , 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983)	4
<i>Downtown v. Vandemark</i> , 571 F.Supp. 40 (N.D. Ohio, 1983)	24
<i>Flores v. Edinburg Consolidated I.S.D.</i> , 741 F.2d 773 (5th Cir., 1984)	17, 18, 21, 24
<i>Franklin v. Rainey</i> , 556 S.W.2d 583 (Tex. Civ. App., Dallas, 1977, no writ).....	16
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972)	20
<i>Gilbert v. Fireside Enterprises, Inc.</i> , 611 S.W.2d 869 (Tex. Civ. App., 1980)	17
<i>Gregory v. Lytton</i> , 422 S.W.2d 586 (Tex. Civ. App., San Antonio, 1967, writ ref. n.r.e.)	7, 9

<i>Gregory v. White</i> , 604 S.W.2d 402 (Tex. Civ. App., San Antonio, 1980, writ ref. n.r.e.); petition for cert. denied, 452 U.S. 939 (1981)	2, 7, 8, 9, 10, 11, 12, 13, 18
<i>Hernandez v. Light Pub. Co.</i> , 245 S.W.2d 553 (Tex. Civ. App., San Antonio, 1952, writ ref.)	20
<i>Hicks v. Quaker Oats Company</i> , 662 F.2d 1158 (5th Cir., 1981)	16
<i>Holmes v. Jones</i> , 738 F.2d 711 (5th Cir., 1984)	16, 21
<i>Hudspeth v. Hudspeth</i> , 673 S.W.2d 248 (Tex. Civ. App., San Antonio, 1984, writ ref. n.r.e.)	16
<i>Huddleston v. Western National Bank</i> , 577 S.W.2d 778 (Tex. Civ. App., Amarillo, 1979, writ ref. n.r.e.)	20
<i>Iacaponi v. New Amsterdam Cas. Co.</i> , 258 F.Supp. 880, D.C. Pa., 1966, aff'd 379 F.2d 311; cert. denied in 88 S.Ct. 802, 389 U.S. 1054, 19 L.Ed. 2d 849)	19
<i>Jones v. City of Alton, Illinois</i> , 757 F.2d 878 (7th Cir., 1985)	26
<i>Kremer v. Chemical Construction Corporation</i> , 456 U.S. 461; 102 S. Ct. 1883, 72 L.Ed. 2d 262 (1982)	14, 23, 25, 27
<i>Lawlor v. National Screen Corp.</i> , 349 U.S. 322 (1955)	24
<i>Lebman v. Sullivan</i> , 198 S.W.2d 280 (Tex. Civ. App., San Antonio, 1946, writ ref. n.r.e.)	20
<i>Marrese v. American Academy of Orthopedic Surgeons</i> , 470 U.S. 373, 105 S. Ct. 1327, 84 L.Ed. 2d 274, (1985)	14
<i>Migra v. Warren City School District of Education</i> , 465 U.S. 75, 104 S. Ct. 892, 79 L.Ed.2d 56 (1984)	14, 23, 25
<i>Montana v. United States</i> , 440 U.S. 147, 153, 99 S.Ct. 970 (1979)	16
<i>Morgan v. City of Rawlins</i> , 792 F.2d 975 (10th Cir., 1986) ..	25
<i>Norco Construction, Inc. v. King County</i> , 801 F.2d 1143 (9th Cir., 1986)	24
<i>Parsons Steel v. First Alabama Bank</i> , 106 S.Ct. 768, 88 L.Ed. 2d 877 (1986)	15
<i>Public Citizen v. Lockheed Aircraft Corporation</i> , 565 F.2d 708 (D.C. Cir., 1977)	3
<i>Ramsey v. Dunlop</i> , 205 S.W.2d 979 (Tex. S. Ct., 1947)	20

	<u>Page</u>
<i>Richardson v. Raby</i> , 376 S.W.2d 422 (Tex. Civ. App., Tyler, 1964, no writ hist.)	20
<i>Scoggins v. State of Kansas</i> , 802 F.2d 1289 (10th Cir., 1986)	25
<i>Stevenson v. International Paper Company</i> , 516 F.2d 103 (5th Cir., 1975)	15
<i>Thournir v. Meyer</i> , 803 F.2d 1093 (10th Cir., 1986)	26
<i>Trevino v. Turcotte</i> , 564 S.W.2d 682 (Tex. Civ. App., 1978)	7
<i>Wasoff v. American Automobile Insurance Company</i> , 451 F.2d 767 (5th Cir., 1971)	15
<i>Wooten v. Dallas Hunting & Fishing Club, Inc.</i> , 427 S.W.2d 344 (Tex. Civ. App., Dallas, 1968, no writ hist.)	19, 20

Constitutional Provisions and Statutes

Texas Constitution, Article I, § 15, V.A.T.S.	19
Texas Constitution, Article V, § 10, V.A.T.S.	19
United States Constitution, Article I, § 2	26
United States Constitution, Article IV, § 1	23
United States Constitution, Amendment I	26
United States Constitution, Amendment V	4
United States Constitution, Amendment XIV	4, 26
United States Constitution, Full Faith & Credit Clause	22
28 U.S.C. § 1738, Federal Full Faith and Credit Statute	13, 14, 22
28 U.S.C. § 1738	14, 23, 24, 25, 27
42 U.S.C. § 1983	3, 4, 13, 14, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28

Other Authorities

Rule 216 et seq., Texas Rules of Civil Procedure	19
Fed. R. Civ. P. 12(b)	3
Fed. R. Civ. P. 12(c)	3
Fed. R. Civ. P. 56	3

No. 86-1673

IN THE
Supreme Court of The United States

CHRISTOPHER GREGORY,

Petitioner,

v.

THOMAS J. DRURY, *et al.*,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO CHRISTOPHER GREGORY'S PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Thomas J. Drury, Lee H. Lytton, Jr., Elena S. Kenedy, Bruno R. Goldapp, Kenneth Oden and The Alice National Bank, Respondents, file this, their Joint Brief in Opposition to Christopher Gregory's Petition for Writ of Certiorari in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1987 is not yet officially reported and is reprinted in Appendix A.²

² Respondents' Joint Appendices to Respondents' Joint Brief in Opposition will be cited as, for example, "Resp.s' App. A-1a". The letter designates the particular Appendix and the number refers to the particular page of the Appendices.

The unreported judgment of the United States District Court for the Southern District of Texas, entered on January 24, 1986, was without opinion and is reprinted in Appendix B.

This Court's denial of a petition for writ of certiorari from a judgment of the Supreme Court of Texas in the prior state court action is reported at 452 U.S. 939 (1981), as shown in Appendix O. The judgment of the Court of Civil Appeals of Texas in the prior state court action is reported at 604 S.W.2d 402 (Tex. Civ. App.-San Antonio 1980, writ ref. n.r.e.), and is reprinted in Appendix K. The final judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on November 28, 1979 was unreported and is reprinted in Appendix I. The interlocutory judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on September 1, 1964 was unreported and is reprinted in Appendix C.

COUNTER-STATEMENT OF THE CASE

PRELIMINARY STATEMENT³

Petitioner in this Federal action in truth and in fact is not invoking 42 U.S.C. § 1983 for its intended purpose of protecting people from unconstitutional action under color of state law, but to relitigate the very same matters he raised or could have raised in the state court. Having litigated these same matters in the state trial court, the intermediate Court of Civil Appeals and the Texas Supreme Court and then finally the U.S. Supreme Court by Petition for Writ of Certiorari (represented by the same attorneys he has in this Federal action), Gregory now again seeks to relitigate the same issues and matters. In effect, he is seeking a direct appeal to a United States District Court to review a final judgment of the Courts of Texas.

³ Petitioner Gregory in his Appellant's Brief filed in the 5th Circuit Court of Appeals in Footnote 3 on page 4 stated: "The Appellees moved under Fed. R. Civ. P. 12(b) to dismiss the Complaint on the grounds that: (1) it failed to state a claim for relief; (2) the action was barred by the statute of limitations; and (3) the action was precluded by res judicata and collateral estoppel. (R.E. 7-10). With respect to the second and third grounds, matters outside the pleadings were presented to and not excluded by the District Court. Under Fed. R. Civ. P. 12(c), the Appellees' motions should have been treated as motions for summary judgment under Fed. R. Civ. P. 56. *See Public Citizen v. Lockheed Aircraft Corporation*, 565 F.2d 708, 711 n.5 (D.C. Cir. 1977). Accordingly, in his Statement of Facts, Gregory will refer to matters of record outside the pleadings."

The Court of Appeals in Footnote 1 of its opinion also noted that "All parties here and below have referred to matters extrinsic to the complaint. They were also considered by the District Court in its grant of a motion to dismiss." The Court of Appeals also noted; "We could, with equal confidence, treat the ruling below as a grant of summary judgment."

In view of the above prior position of Gregory and the findings and ruling of the Fifth Circuit, he is now in no position to limit any consideration to a dismissal under Fed. R. Civ. P. 12(b), especially when he seeks to bolster his position by references to newspaper articles. These matters are not a part of the record of this case, and should not be considered for any purpose by this Court. Accordingly, Respondents do not make reference to extraneous articles which are supportive of Respondents' position.

The United States Supreme Court in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983), stated: "As we have noted, supra, at 476, 75 L.Ed. 2d, at 218, a United States District Court has no authority to review final judgments of the state court in judicial proceedings. Review of such judgment may be had only in this Court." (p.222)

The Supreme Court in *Feldman* in Footnote 16 of its opinion explained:

As we noted in *Atlantic Coast Line Railroad Company v. Brotherhood of Engineers*, 398 U.S. 281, 26 L.Ed.2d 234, 90 S. Ct. 1739 (1970), "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Id.*, at 296, 26 L.Ed.2d 234, 90 S. Ct. 1739.

Moreover, the fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims.

HISTORY OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On September 21, 1981, the Petitioner, Christopher Gregory ("Gregory"), filed this action in the United States District Court for the Western District of Texas. Gregory named as Defendants the then members of the Kenedy Memorial Foundation, Elena S. Kenedy, Bruno O. Goldapp, Kenneth Oden, Lee H. Lytton, Jr., and Bishop Thomas J. Drury, and also named as Defendants were the then Attorney General of the State of Texas and the Alice National Bank. In his Complaint, Gregory alleged that the Respondents and others successfully combined and conspired to deprive him of his rights to trial and trial by jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution, U.S. Const. Amend. V and XIV, and 42 U.S.C. § 1983.

On October 14, 1981, the Texas Attorney General filed his Original Answer and Motion for Judgment on the Pleadings, in which he sought dismissal of the Complaint on the grounds of res judicata and failure to state a claim for relief. Respondent, Lee H. Lytton, Jr., ("Lytton") filed a similar Answer and Motion on October 23, 1981. On October 26 and 29, 1981, the Respondents, Thomas J. Drury (then the Bishop of the Diocese of Corpus Christi), Elena S. Kenedy, Bruno R. Goldapp, Kenneth Oden and the Alice National Bank filed original Answers, including the defense of improper venue, Motions for Judgment on the Pleadings, limitations and laches. Pursuant to the U.S. District Court's Order, on March 31, 1982, Gregory filed an Amended Complaint.

On April 9, 1982, the District Court for the Western District of Texas transferred the case to the Southern District of Texas, on the grounds of forum nonconvenience and the National Bank Act. On May 18, 1982, Gregory moved to disqualify Judge Hayden Head, Jr., the District Court's Judge originally assigned to the case after transfer to the Southern District of Texas. Judge Head disqualified himself by Order entered October 8, 1982. This action was then assigned to Judge Bue on or about October 3, 1983.

On June 19, 1985, Judge Bue scheduled all then pending motions in this cause for hearing on October 31, 1985. The hearing on all pending motions subsequently was rescheduled for January 9, 1986. On January 9, 1986, after a lengthy hearing in chambers, Judge Bue granted the Respondents' Motions for Judgment on the Pleadings (with costs) and denied as moot the remaining Motions. An Order was entered on January 24, 1986, granting the Respondent's Motion for Judgment on the Pleadings and dismissing Gregory's action with prejudice and denying all other relief not expressly granted or which was inconsistent with the dismissal.

On January 27, 1987, the Fifth Circuit Court of Appeals affirmed the judgment of the U.S. District Court by written opinion reprinted in Appendix A.

STATEMENT OF THE FACTS⁴

During her lifetime, Mrs. Sarita K. East, a Texas resident, caused to be incorporated under the Texas Non-Profit Corporation Act, The John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member, but in February 1960, she appointed Jacob S. Floyd and Lee H. Lytton, Jr., both residents of the State of Texas, as co-members of such Foundation. Sometime thereafter she requested and received their resignations as members. In December 1960, Mrs. East appointed Gregory, a Trappist monk based in Spencer, Massachusetts, as a co-member. The Will of Sarita K. East, dated January 22, 1960, left the residue of her estate to her Foundation. A First Codicil to said Will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi, Texas, as her successor to membership in such Foundation upon her death. Thereafter, from time to time, Mrs. East made additional codicils to such Will, and under the Third Codicil, she revoked the First Codicil which named the Corpus Christi Bishop, and appointed Gregory,

⁴ All parties to this action, the U.S. District Court, and the Fifth Circuit Court of Appeals have treated the skeleton facts outlining the history of the state court decisions in such cases as a statement of undisputed facts in this case. Respondents, in their statement of facts, refer to facts outlined in such previous state court cases and to those in the record of this case. Numerous facts alleged to be true in Petitioner's Petition for Writ of Certiorari have no basis in any of the previous state court decisions or in this record. For example, on page 5 above of Petitioner's Petition to this court, Respondents cite these statements as having no basis in any prior state decision or in this record, to-wit:

a. "The Foundation was established on January 22, 1960, by a wealthy and deeply religious South Texas widow, Sarita Kenedy East, for the purpose of assisting the poor and underprivileged primarily in South America."

b. "However, Mrs. East discovered shortly thereafter that Floyd's advice was erroneous."

c. "It was because of one such South American trip with Gregory that Sarita East decided to form the Foundation and dedicate its resources to the poor in South America."

The remainder of the Petition is replete with erroneous assertions not found in this record or in any of the previously reported state decisions.

Peter Grace and Father Patrick J. Peyton as successor-members to her after her death. (*Gregory v. Lytton*, 422 S.W.2d 586, Tex. Civ. App., San Antonio, 1967, writ ref. n.r.e., at page 587; Resp.s' App. Q-204a)

In February 1961, Mrs. East died in New York City and thereafter, in April 1961, Lytton (later joined by Floyd) filed a suit against Peter Grace, Father Peyton, Thomas Doyle and J. J. Meehan, all residents of the State of New York, the Foundation and Gregory, said suit being filed in the District Court of Jim Wells County, Texas, as Cause No. 12,074, styled Lee H. Lytton, Jr., et al. v. The John G. and Marie Stella Kenedy Memorial Foundation et al. The Attorney General of Texas was later joined in the suit as an indispensable party. Lytton and Floyd alleged generally that their respective resignations as members of the Foundation were obtained as a result of undue influence exerted upon Mrs. East by Gregory, et al. and that the revocation of the First Codicil appointing the Corpus Christi Bishop and the December 1960 appointment of Gregory as a member of the Foundation were also procured as a result of undue influence practiced upon Mrs. East by Gregory et al. *Gregory v. Lytton*, supra, at page 587; (Resp.s' Q-204a) The Houston, Texas, law firm of Baker & Bóttts (Messrs. Robert K. Jewett and Denman Moody) were retained to represent Gregory, Peter Grace, Father Peyton, Tom Doyle, Jack Meehan and the Kenedy Memorial Foundation. (*Gregory v. White*, 604 S.W. 2d 402, Tex. Civ. App., San Antonio, 1980, writ ref. n.r.e., at page 404; petition for cert. denied, 452 U.S. 939 (1981) Resp.s' App. K-86a)

Thereafter, a contest of the Will and Codicils of Mrs. East was filed by her heirs-at-law on July 25, 1962. (*Trevino v. Turcotte*, 564 S.W.2d 682, Tex. S. Ct., 1978, at page 684; Resp.s' App. T-291a) While the Will contest was pending, under date of October 28, 1963, a settlement agreement was fully executed in this case and on September 1, 1964, an agreed interlocutory judgment was entered by the Court upon such settlement agree-

ment with prejudice as to all parties. (*Gregory v. White*, supra, at page 404; Resp.s' App. K-86a).

In connection with such settlement, a full and final agreement between the parties was reached in August of 1963, and each of the clients represented by Baker & Botts (including Gregory) consented in writing by affixing their signatures to the settlement agreement and agreed Judgment. Gregory signed both documents as "Christopher Gregory," and under the name appeared "Christopher Gregory, Sometimes Known as Brother Leo, OCSO, Defendant and Cross-Defendant, Acting Individually and as a Religious of the Cistercian Order of the Strict Observance Under Valid Authority of His Lawful Religious Superior." The documents signed by Gregory, Grace, Doyle, Meehan and Father Peyton were transmitted to Baker & Botts and received by them on October 9, 1963; whereupon, Baker & Botts presented the agreement to Mr. Kenneth Oden as the representative of Lytton and Floyd on October 10, 1963, and Mr. Oden undertook to present it to his clients for their signatures. The settlement agreement and Judgment were then signed by the Texas Group and the last person to sign was Mr. Zuber, Assistant Attorney General of Texas, and he signed on October 28, 1963. (*Gregory v. White*, supra, at page 404; Resp.s' App. K-86a)

Thereafter, on September 1, 1964, the settlement agreement was presented to the trial court for approval and entry of Judgment thereon. Mr. Jewett was acting as a member of his firm Baker & Botts, in the entry of the Judgment which was provided for in the settlement agreement. Mr. Jewett acted upon the terms and provisions of the signed settlement agreement and agreed Judgment which were delivered to him for implementation, and with that authority from Gregory, his attorney, Mr. Jewett, satisfied the requirements of the settlement agreement with respect to the membership of the Foundation and all other provisions of the settlement agreement. Certain corporate proceedings were to take place in open court incident to the implementation of the Judgment, and Mr. Jewett acted in carrying out in open court

those corporate proceedings. Mr. Jewett obtained a proxy from Grace and he received an authorization from Gregory's Abbot, Thomas Keating, to act for Gregory in carrying out the corporate proceedings. Mr. Jewett had been advised that further authority to act for Gregory in implementing the settlement and Judgment would be sent to him, and Mr. Jewett did thereafter receive a letter dated July 9, 1964, signed by Gregory and addressed to his Abbot.⁵ This letter from Gregory to his Abbot granted to the Abbot full power and authority to act for Gregory in the premises and, in connection with the implementation of the settlement agreement and agreed Judgment. (*Gregory v. White*, supra, at page 404; *Gregory v. Lytton*, supra, at page 588; Resp.s' App. K-86-a; Resp.s' App. Q-204a)

Some one and one-half years after the entry of the Judgment, Gregory gave to the trial court his first notice of his claim of non-consent by the filing of his Application for Bill of Review on March 8, 1966, seeking to set aside the agreed Judgment. The Bill of Review was dismissed and the Court of Civil Appeals affirmed. (*Gregory v. Lytton*, supra, at page 586, 587; Resp.s' App. Q-204a)

Thereafter, Gregory filed his Motion in Cause No. 12,074 in the District Court of Jim Wells County, Texas, on August 1, 1968, to set aside such agreed Judgment. In Gregory's Motion to set aside the agreed Judgment (and in his Amended Motion to set aside Judgment), Gregory asserted:

⁵ The July 9, 1964, letter from Petitioner to Abbot Keating read in pertinent part as follows:

"Reverend Father: Aware that what I am today signing may be at any time used by the person to whom it is addressed in any manner that he in conscience may see fit, I wish to make the following carefully worded but unequivocal statement

"In the present situation I accept the decision of events in the light of the above, without condition and thus I shall initiate no further action whatsoever concerning the Kenedy Memorial Foundation. The word 'initiate' does not preclude my cooperating in such actions as my superiors may judge to be necessary for the finalizing of the settlement already agreed upon."

1. That his consent to the settlement and agreed Judgment was obtained by duress;
2. That his consent was conditionally given, and these conditions were never met;
3. That the delivery of the signed settlement agreement and the entry of the agreed Judgment was made by a person or persons unauthorized to make such delivery under the circumstances;
4. That the settlement became impossible of performance by reason of the death of Jacob Floyd;
5. That the settlement agreement had been altered and provisions changed and added without his consent, and without the consent of any person authorized by him;
6. That the settlement agreement was incomplete and incapable of settling all the issues;
7. That the Defendant was not present at the entry of the Judgment, and that he had not authorized the person or persons purporting to act for him at the time of entry of the Judgment;
8. That in any event, he no longer consented to the settlement agreement or the agreed Judgment; and
9. That all pleadings by all other parties were denied.

(Resp.s' App. E-42a; Resp.s' App. F-46a)

After Gregory's filing of his Motion to set aside the agreed Judgment, he took no action on this motion for eleven years.

In 1978, the Will contest was terminated (Resp.s' App. T-291a) and except for the pendency of Gregory's Motion to set aside the agreed Judgment, the time had come for the trial court to make such Judgment a final one. Therefore, on July 24, 1979, the Attorney General of Texas et al. filed a motion for the Entry of Final Judgment and to Dismiss Petitioner's Motion to Set Aside the Interlocutory Judgment. (*Gregory v. White*, supra, at page 403; Resp.s' App. K-86a) On or about September 13, 1979, Gregory filed his first Amended Motion to set aside the agreed

interlocutory Judgment, and a copy of said pleading was served upon all parties in interest in the litigation, including the Alice National Bank, Mrs. Kenedy, Goldapp and Oden. (Resp.s' App. F-46a) All of the members and directors of the Kenedy Memorial Foundation (Mrs. Kenedy, Bishop Drury, Lytton, Goldapp and Oden) were served either individually or through their attorney with a copy of said pleading by registered mail. Thereafter, Kenneth Oden intervened in the action and filed an answer to the Motion and Amended Motion of Gregory to set aside the interlocutory agreed Judgment in behalf of the Kenedy Memorial Foundation, Mrs. Kenedy, Bishop Drury, Lytton, Goldapp, the Alice National Bank, as Independent Executor of the East Estate, and Oden, individually. The answer denied all allegations made by Gregory in his Motions to set aside the agreed interlocutory Judgment. (Resp.s' App. G-52a) An answer to the Motion of the Attorney General for entry of Final Judgment and dismissal of the Gregory Motion was also filed by Oden in behalf of the same named parties above described. (Resp.s' App. H-55a) Gregory made no effort to attempt to strike any of the parties. In addition, the above-named parties have participated in the proceedings of Cause No. 12,074 through Final Judgment and on each appeal of such Judgment through the Supreme Court of the United States. (*Gregory v. White*, supra, at page 403; Resp.s' App. K-86a)

A trial upon the issues raised by Gregory's Motion and the Motion for the Attorney General was held on September 21, 1979. The record in the state proceedings discloses that Gregory's jury demand at this proceeding was not timely made, and that Gregory failed to complain of the lack of a jury at the time of the trial on September 21, 1979. Nor did he move for continuance orally or in writing on the ground that he was not prepared to go to trial. The matters in issue were then tried to the Court, without a jury, and upon hearing, the court entered Final Judgment and dismissed Gregory's Motion. (*Gregory v. White*, supra, at page 403; Resp.s' App. K-86a) Gregory appeared in person and with his counsel at the September 21, 1979, trial and he testified in

support of his legal positions in issue therein. Gregory specifically asserted in his Petition for Writ of Certiorari in *Gregory v. White* (Resp.s' App. N-114a) that he raised the issues of right to trial and right to trial by jury in the trial court. (Resp.s' App. N-127a)

At the trial court level, Gregory essentially took the position that even though he had signed the settlement agreement and agreed interlocutory Judgment, yet he did not consent at the time of the hearing, September 21, 1979, to the entry of Final Judgment, and, therefore, such Judgment could not be made final. The Attorney General and Kenedy Memorial Foundation et al. offered evidence showing the unconditional nature of the consent and agreement of Gregory, as well as the authority of those acting in behalf of Gregory on September 1, 1964, at the time such settlement and agreed interlocutory Judgment were entered of record. (*Gregory v. White*, supra, at page 403-404; Resp.s' App. K-86a)

Final Judgment was entered by the Texas court on November 28, 1979, and Gregory filed an appeal to the Court of Civil Appeals (Fourth Supreme Judicial District — San Antonio), wherein he raised four points of error. In such brief Gregory asserted (1) that the trial court erred in entering Final Judgment without a trial on the merits; (2) that the trial court erred in rendering the settlement agreement and interlocutory Judgment final without a trial on the merits of the issues raised by Gregory in his Motion; (3) that the trial court erred in dismissing his Motion without a jury trial; and (4) that the trial court denied Gregory due process of law in entering Judgment without a trial on the issues raised by Gregory in his Motion. (Resp.s' App. J-68a)

The Texas Court of Civil Appeals held that the evidence conclusively established that Gregory signed the settlement agreement and that the Judge had no reason to know of any dissatisfaction which Gregory might have had with the agreement at the time the interlocutory Judgment was rendered and that since the trial court had no knowledge of any lack of consent prior

to entry of the interlocutory order, Gregory could not prevent Final Judgment by attempting to later withdraw his consent. In connection with Gregory's claim of conditional delivery of the settlement agreement and agreed Judgment, the Court of Civil Appeals noted that "neither the Appellant's (Gregory's) attorneys, the attorneys for the Appellees, the trial Judge, nor any of the other parties to the suit knew of the conditional nature of his consent until several months after the Judgment was rendered." (*Gregory v. White*, *supra*, at page 404; Resp.s' App. K-86c)

Gregory then filed an Application for Writ of Error to the Supreme Court of Texas, wherein he again asserted his denial of a trial on the merits point, his denial of a jury trial point, and his denial of due process point. These points of alleged error are more particularly described in Gregory's Application for Writ of Error. (Resp.s' App. L-93a) The Supreme Court of Texas refused the writ, citing no reversible error. (Resp.s' App. M-113a)

Gregory then filed his Petition for Writ of Certiorari to the United States Supreme Court, represented therein by the same counsel, (James D. St.Clair, Hale and Dorr) in this present action and appeal, wherein he again asserted a denial of due process in that he alleged he was denied both a trial on the merits on the issues raised by his Motion and he was denied a jury trial. Gregory also raised other points more particularly described in his Petition for Writ of Certiorari. (Resp.s' App. N-114a) On June 15, 1981, the United States Supreme Court denied Gregory's Petition for Writ of Certiorari and let stand the judgments and actions of the Courts of Texas. (Resp.s' App. D-191a)

Thereafter, Gregory filed the Complaint in this cause on September 17, 1981, asserting essentially the same facts as were asserted in the Texas case, except that the actions of the party Defendants were now cast in the form of a conspiracy involving the Attorney General of the State of Texas, and alleged violations of 42 U.S.C. § 1983 were brought forward in this federal action. (Resp.s' App. P-192a)

REASONS FOR DENIAL OF THE WRIT

1.

IN ACCORDANCE WITH 28 U.S.C. § 1738, THE FEDERAL COURTS MUST GIVE PRECLUSIVE EFFECT TO A PRIOR STATE COURT JUDGMENT WHERE THE NEW CLAIM ASSERTED UNDER 42 U.S.C. § 1983 IN A SUBSEQUENT ACTION BETWEEN THE SAME PARTIES AND REQUESTING THE SAME RELIEF IS ENTIRELY GROUNDED UPON AND BASED UPON THE IDENTICAL FACTS AND ISSUES WHICH HAVE ALREADY BEEN ASSERTED AND FULLY ADJUDICATED IN PRIOR STATE COURT ACTIONS AND APPEALS FROM SUCH STATE COURT ACTIONS TO THE UNITED STATES SUPREME COURT.

The Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, requires and it is now settled law that a Federal court must give to a State court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982). *Allen v. McCurry* made clear that issues actually litigated in a State court proceeding are entitled to the same preclusive effect in a subsequent Federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered. In *Migra v. Warren City School Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the Supreme Court extended and applied the same preclusive effect of a State court judgment in a subsequent Federal § 1983 suit that the § 1983 litigant could have raised but did not raise in the earlier State court proceeding.

The Full Faith and Credit Clause "Allows the States to determine . . . the preclusive effect of judgments in their own courts" *Marrese v. American Academy of Orthopedic Surgeons*,

470 U.S. 373, 380; 105 S.Ct. 1327, 1332; 84 L.Ed.2d 274, 281 (1985); *Parsons Steel v. First Alabama Bank*, 106 S.Ct. 768; 88 L.Ed.2d 877 (1986).

Under the Texas Doctrine of res judicata and collateral estoppel, Gregory must concede without reservation all of the factual issues and claims placed in dispute in Cause No. 12,074 in the District Court of Jim Wells County, Texas, and all appeals therefrom; since the same facts and issues asserted in the previous Texas case formed the basis for Gregory's § 1983 action, no new facts or independent claim has been asserted which has not already been the subject of state judicial review and disposition.

The principal of res judicata will bar relitigation in a subsequent action of an issue which was or should have been in the earlier action if (1) the prior judgment has been rendered by a court of competent jurisdiction, (2) the decision was a final judgment, (3) the same parties are involved in both actions, and (4) the same cause of action is involved in both suits. *Wasoff v. American Automobile Insurance Company*, 451 F.2d 767 (5th Cir., 1971) Under res judicata, the judgment in the first case bars the subsequent action "not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." *Stevenson v. International Paper Company*, 516 F.2d 103, 109 (5th Cir., 1975)

Under the Texas law of res judicata,

" an existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. Further, the rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which with the use of diligence might have been tried in a former action as well as those which were actually tried." *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 642 (Tex. S. Ct., 1971)

For the principle of res judicata to be applicable as a preclusion to subsequent claims or issues, definite elements must be shown to exist, namely identity of parties, issues, subject matter, relief sought and cause of action. *Franklin v. Rainey*, 556 S.W.2d 583, 585 (Tex. Civ. App., Dallas, 1977, no writ); *Bonniwell v. Beech Aircraft Corporation*, 663 S.W.2d 816, 818 (Tex. S. Ct., 1984); *Hudspeth v. Hudspeth*, 673 S.W.2d 248 (Tex. Civ. App., San Antonio, 1984, writ ref. n.r.e.)

Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979); *Allen v. McCurry*, 101 Sup. Ct. 411, 414, (1980) There are three requirements for the application of collateral estoppel to a federal claim: (1) identify between the issue at stake and the issue litigated in the earlier proceeding, (2) actual litigation of the critical issue, (3) necessity that the decision on the issue in the prior litigation be a necessary, essential part of the judgment in the earlier action. *Holmes v. Jones*, 738 F.2d 711 (5th Cir., 1984); *Hicks v. Quaker Oats Company*, 662 F.2d 1158 (5th Cir., 1981)

In the case before this Court, Gregory has heretofore conceded that the prior final judgment in the Texas court was rendered by a court of competent jurisdiction, and that for res judicata purposes, the requirement that the prior judgment be a final judgment on the merits has been established.

As to the identity of parties, this record clearly shows that the Respondents were all a party to the litigation in the prior state action, and they were all parties to the September 1, 1964, interlocutory judgment and agreed settlement, and they all appeared in the trial of September 21, 1979. (Resp.s' App. G-52a; App. H-55a; App. I-58a) In addition, these Respondents participated in every appeal proceeding of the prior Texas judgment, and

they were specifically named by Gregory as a party Defendant to this litigation under 42 U.S.C. § 1983.

The Texas courts have expressly held that persons who have a direct interest in the litigation and exercise their right to participate therein, including the participation in appeals from such litigation, then such persons are real parties to the action, and they are bound by the judgment as though they were a named party. (*American Indemnity Company v. Fellbaum*, 263 S.W. 908, Tex. S. Ct., 1924); *Cavers v. Sioux Oil and Refining Co.*, 39 S.W.2d 862 (Comm. App., 1931)

Since the parties to this action are identical (save and except the New York Defendants in Cause No. 12,074, which Gregory has chosen not to join in this action), the requirement for identity of parties is clearly established.

The primary legal issue before this court concerns the question of whether the federal claims asserted in Gregory's § 1983 action is "a different cause of action" than those asserted in the prior Texas action, and if such claim is "a different cause of action," then whether such claim is precluded under either the doctrine of res judicata or collateral estoppel.

The Fifth Circuit has recently reviewed the Texas law governing res judicata and its application to federal claims or causes of action filed under 42 U.S.C. § 1983 in *Flores v. Edinburg Consolidated I.S.D.*, 741 F.2d 773 (5th Cir., 1984). A full analysis of style cases from the Texas Supreme Court was made in Justice Higginbotham's opinion, and particular attention was directed to the legal question concerning "a different cause of action" under Texas law in a § 1983 case. The court held,

" if res judicata barred the relitigation only of those issues actually decided in the first action, it would be indistinguishable from collateral estoppel with respect to the issues raised in the pleadings; only with respect to issues that should have been raised in the pleadings but were not raised would res judicata pose a greater bar than collateral estoppel. See *Gilbert v. Fireside Enterprises, Inc.*, 611 S.W.2d 869, 871

and note 4 (Tex. Civ. App., 1980). Furthermore, if the pleading of a different legal theory would have induced the court to decide a particular issue in the first action, the issue is plainly one 'which, with the use of diligence might have been tried in the former action.' Diligence is, in brief, a key determinant of the applicability of the res judicata bar to any particular issue” page 776

“ We conclude therefore that ‘a different cause of action’ is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be managed even if all the disputed factual issues raised in the Plaintiff’s original complaint are conceded in the Defendant’s favor” page 777

Applying this test to Gregory’s § 1983 claims, as in the *Flores* case, Gregory cannot concede the factual issues previously raised in the Texas courts and at the same time prevail in his § 1983 claim. His federal action claims are grounded upon material facts and issues that were litigated in the prior action.

Gregory asserts that his claims of lack of consent, duress, coercion and related claims were never litigated. It is obvious from the opinion of the Texas Court of Appeals in *Gregory v. White*, supra, that once the settlement agreement had been incorporated into the judgment of the court, Gregory had the opportunity and the duty, if he wished to set aside such interlocutory judgment, to come forward with affirmative proof or evidence of fraud or collusion in connection with the original entry of the September 1, 1964, interlocutory judgment. *Gregory v. White*, supra, at page 403. Incident to any such allegation and proof of fraud or collusion, Gregory had the opportunity to offer evidence of lack of consent by Jewett, duress, coercion or any other related claim to show impropriety with the entry of the September 1, 1964, judgment. This he failed to do; conversely, Respondents offered affirmative evidence of the unconditional and untarnished nature of such prior interlocutory judgment and the surrounding circumstances of its entry.

Gregory in such trial proceeding chose to rely solely on the erroneous legal proposition that he had now represented to the trial court prior to the rendition of a final judgment that he no longer consented to the terms of the interlocutory judgment, and that the court was under a duty to set such interlocutory judgment aside and to proceed to hear the matters in controversy created by the withdrawal of the interlocutory judgment.

The state is free to establish its own procedures and practices with regard to conduct of civil litigation in Texas courts, including the right to trial by jury. *Iacaponi v. New Amsterdam Cas. Co.*, 258 F. Supp. 880, D.C. Pa., 1966, aff'd 379 F.2d 311; cert. denied in 88 S. Ct. 802, 389 U.S. 1054, 19 L.Ed. 2d 849; *Wooten v. Dallas Hunting & Fishing Club, Inc.*, 427 S.W. 2d 344 (Tex. Civ. App., Dallas, 1968, no writ hist.)

Accordingly, the Texas courts have established their own procedures and practices in connection with the right to a jury trial in civil matters. Article I, Section 15 and Article V, Section 10 of the Texas Constitution, V.A.T.S., preserve and protect the right of any litigant in a civil case to be afforded a jury trial, provided however, that these Texas Constitutional provisions further empower the state legislature to enact such statutes as are necessary to regulate the right to trial by jury.

The Texas Rules of Civil Procedure have been promulgated as the rules governing the trial of civil cases in all Texas courts. Rule 216 et seq., of these Rules of Civil Procedure specifically prescribe the provisions related to the right to a jury trial.⁶

The right to trial by jury in Texas is not an absolute right in civil cases, but rather, it is subject to certain procedural rules,

⁶ Rule 216 provides that "No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance."

such as Rule 216 of the Texas Rules of Civil Procedure. *Wooten v. Dallas Hunting & Fishing Club, Inc.*, supra.

Even though the provisions of Rule 216 have been held to be discretionary rather than mandatory in their application, the Texas courts have consistently held that when Rule 216 has not been complied with, a trial court's decision to grant or deny a jury trial will not be reversed on appeal except on a showing of abuse of discretion by the trial court. In the previous appeals in the Texas courts and to this Supreme Court, it was Gregory's burden on appeal to show an abuse of such discretion. *Childs v. Reunion Bank*, 587 S.W.2d 466, (Tex. Civ. App., Dallas, 1979, writ ref. n.r.e.); *Arnoff v. Texas Turnpike Authority*, 299 S.W.2d 342 (Tex. Civ. App., Dallas, 1957, no writ hist.); *Wooten v. Dallas Hunting & Fishing Club, Inc.*, supra. The abuse of discretion, if any, must be shown and must be "apparent on the face of the record." *Ramsey v. Dunlop*, 205 S.W. 2d 979 (Tex. S. Ct., 1947); *Hernandez v. Light Pub. Co.*, 245 S.W.2d 553 (Tex. Civ. App., San Antonio, 1952, writ ref.) The record in this case and in the previous Texas appeals is completely void of any showing of an abuse of discretion by the trial court. Since there is nothing in the record to show any of the circumstances surrounding the jury request except that it was untimely made, no error and no abuse of discretion was shown by Gregory in the prior appeal or in this appeal. *Lebman v. Sullivan*, 198 S.W.2d 280 (Tex. Civ. App., San Antonio, 1946, writ ref. n.r.e.); *Arnoff v. Texas Turnpike Authority*, supra.

By failing to press his jury demand at trial, Gregory waived his untimely jury demand and consented to a non-jury trial of the issues before the court. *Hernandez v. Light Pub. Co.*, supra; *Richardson v. Raby*, 376 S.W.2d 422 (Tex. Civ. App., Tyler, 1964, no writ hist.); *Huddleston v. Western National Bank*, 577 S.W.2d 778 (Tex. Civ. App., Amarillo, 1979, writ ref. n.r.e.).

Due process involves the fundamental right to be heard and the full and fair opportunity to litigate issues and present evidence at a meaningful time and in a meaningful manner. *Fuentes v.*

Shevin, 407 U.S. 67 (1972) Gregory had a full and fair opportunity to litigate those issues and facts that could have given rise to the setting aside of the interlocutory judgment, and he failed to do so. There has been no denial of his right to litigate those issues pertaining to the propriety of the interlocutory judgment "in a meaningful manner," and he should not now be heard to complain from his lack of diligence or his erroneous concepts of Texas law.

Applying the *Flores* test regarding the concession and admission of all facts and issues in dispute in the prior state action, Gregory would have to concede that his execution of the settlement agreement which was incorporated into the interlocutory judgment was accomplished without coercion or duress, and that the judgment was entered with his full consent, authority and without fraud or collusion of any person. The conceding of these issues and factual basis completely defeats and renders Gregory's § 1983 claims to be without merit as a matter of law in that such federal claims are grounded on facts and issues heretofore litigated in favor of Respondents. A review of Gregory's factual assertions and the issues presented in his Amended Complaint in this § 1983 case as compared with the factual allegations and issues presented in the Texas Courts and previously to this court, clearly demonstrate that his § 1983 claim is predicated on the same factual background and issues which have previously been adjudicated by the Texas Courts.

The designation by Gregory of certain facts as a conspiracy, all of these facts being adjudicated in a previous state proceeding, and the allegation that he has been denied (1) membership in the Kenedy Memorial Foundation, (2) the right of trial and (3) the right to jury trial, all of the foregoing being as a result of such alleged conspiracy, do not alter or change the character of the facts, the issues or the alleged claims in the prior state proceedings or in this proceeding. *Holmes v. Jones*, supra.

Although Gregory continues to deny to this court that his right to a trial on the merits and right to trial by jury were issues before

the Texas courts, in his first Petition for Writ of Certiorari to this court, Gregory claimed in connection with the September 21, 1979, trial, that:

“Counsel for Gregory appeared at the hearing and raised the issue of Keating’s lack of authority under civil law to grant a power of attorney on behalf of Gregory. He also raised the issues of right of trial and right to trial by jury.” (Resp.s’ App. N-127a)

In each stage of the appeal process in Texas courts, and to this court, he raised the same denial of trial and denial of jury trial points that are raised in this § 1983 action. (Resp.s’ App. J-68a; App. L-93a; App. N-114a)

The subject matter of the prior Texas case and this § 1983 federal action are the same — a determination or redetermination of who is entitled to serve as members and directors of the Kenedy Memorial Foundation. The relief sought in this proceeding is the same relief sought in the prior Texas case — to appoint Gregory as the sole member and/or director of the Kenedy Memorial Foundation with complete authority over such Foundation to the exclusion of all other interested parties. The same “rights” are asserted by Gregory herein as were asserted in the prior state action; the same “wrongs” are asserted by Gregory in this action as form the basis of the factual allegations in prior state action; and the same facts are required in each case for Gregory to have sustained and substantiated his claims and requested relief.

In light of the foregoing, these Respondents submit that the requisite elements for the application of res judicata and/or collateral estoppel to preclude the § 1983 federal claims of Gregory have been clearly identified and established as a matter of law, in that this federal litigation involves:

- a. The same parties, subject matter, issues and factual determinations, relief sought and causes of action;

b. The express federal claims of denial of a trial on the merits and denial of jury trial were raised at the trial court and every appeal thereafter, and thus, they have been the subject of full and fair state judicial review and disposition;

c. The operative facts on which Gregory relies in this § 1983 claims have been litigated in state court, and therefore, all such facts and issues must be conceded in favor of Respondents;

d. With the conceding of those facts and issues placed in dispute and litigated in the state court in favor of Respondents, Gregory has failed to state a claim upon which relief may be granted as a matter of law.

In connection with the res judicata — collateral estoppel application of final state court judgment to subsequent federal § 1983 claims, it is now well established that the doctrines of res judicata and collateral estoppel may be utilized to preclude both issues and/or claims that have been asserted and litigated in prior state actions, irrespective of whether the precise federal claim was asserted in the prior state action. *Allen v. McCurry*, supra; *Migra v. Warren City School District Board of Education*, supra; *Kremer v. Chemical Construction Corporation*, supra

Under the Constitution's Full Faith and Credit Clause and the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, a federal court must give the state court judgments the same preclusive effect as would be given that judgment under the law of the state in which such judgment was rendered. *Allen v. McCurry*, supra; *Kremer v. Chemical Construction Corporation*, supra; *Migra v. Warren City School District Board of Education*, supra; U.S. Const., Art. IV, § 1; 28 U.S.C. § 1738.

In determining the application of res judicata or collateral estoppel to an asserted § 1983 claim in this case, the federal court must apply the Texas preclusion law. If under Texas law, the issue or claim asserted would be barred by res judicata or collateral estoppel, then the federal court will give the prior

judgment the same preclusive effect as the Texas court. *Flores v. Edinburg Consolidated I.S.D.*, supra, 28 U.S.C. § 1738.

In this appeal, Gregory attempts to cast this case as one of first impression because "Gregory's federal § 1983 claims did not mature until after the judgment became final," and therefore, he asserts that the § 1983 claim is a new claim and not precluded by the Texas judgment. If Gregory's § 1983 claim were grounded upon facts and issues other than those placed in issue and previously adjudicated in the Texas Courts, his alleged claim would not be precluded. However, the very facts and issues which give rise to his asserted § 1983 claim have been previously asserted by him and fully adjudicated. The cases cited by Gregory regarding the maturing of his § 1983 claim after the Texas judgment [*Lawlor v. National Screen Corp.*, 349 U.S. 322 (1955); *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986); *Battieste v. Baton Rouge*, 732 F.2d 439 (5th Cir. 1984); *Downtown v. Vandemark*, 581 F.Supp. 40 (N.D. Ohio, 1983)] and related cases, are not in point with the case before this court because the underlying factual basis for the newly asserted claims in the instant cases had *not* been previously asserted or litigated in the previous state action.

Thus, the Fifth Circuit correctly applied claim preclusion to Gregory's asserted § 1983 claim in accordance with applicable state and federal law.

2.

THERE IS NO CONFLICT IN THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AND THOSE DECISIONS OF THE SEVENTH AND TENTH CIRCUIT COURTS OF APPEAL IN THEIR CLAIM PRECLUSION APPLICATION UNDER 28 U.S.C § 1738 AND 43 U.S.C. § 1983 TO PRIOR STATE COURT JUDGEMENTS.

Gregory has erroneously asserted that a conflict exists between the decisions of the Fifth Circuit and the Seventh and Tenth

Circuits regarding the application of claim preclusive effect to prior state court judgments in subsequent cases asserted under § 1983. No such conflict existed prior to the decisions of the Fifth Circuit in this case, and no such conflict has been created by such decision. Each of the cases cited by Gregory to be in conflict with the Fifth Circuit's decision in this case is clearly distinguishable.

In each applicable instance, irrespective of whether the cases were determined by the Fifth Circuit, Seventh Circuit or Tenth Circuit, these courts have uniformly applied the provisions of 28 U.S.C. § 1738 and 42 U.S.C. § 1983, and each circuit has adhered to the application of the foregoing provisions in accordance with the *Migra v. Warren City School District of Education*, supra, *Allen v. McCurry*, supra, *Kremer v. Chemical Construction Corp.*, supra, and related Supreme Court precedent.

Each circuit has not hesitated to apply 28 U.S.C. § 1738 to give a state court judgment the same preclusive effect as the state rendering the judgment would permit. In accordance with *Allen v. McCurry*, each circuit will deny a litigant a federal forum for the assertion of federal constitutional rights if a state tribunal has both recognized the constitutional claims asserted and provided fair procedures for determining them.

The cases cited by Gregory simply apply 28 U.S.C. 1738 in accordance with the applicable state claim preclusion law. Such cases do not even suggest a conflict with decisions of the Fifth Circuit.

In *Scoggins v. State of Kansas*, 802 F.2d 1289 (10th Cir. 1986), the subsequent claim asserted in federal court was not considered precluded by a prior administrative agency decision because the Tenth Circuit found the Courts of Kansas would not have given preclusive effect to the prior decision.

In *Morgan v. City of Rawlins*, 792 F.2d 975 (10th Cir. 1986), the Tenth Circuit held that a subsequent Federal § 1983 action was not precluded by a prior Wyoming state court action because

applying Wyoming principals of claims preclusion it would not be precluded under the laws of that State.

In *Thournir v. Meyer*, 803 F.2d 1093 (10th Cir., 1986), Eileen M. Thournir sued the Colorado Secretary of State under 42 U.S.C. § 1983, challenging a Colorado statute that requires a person wishing to run as an unaffiliated candidate to be registered in Colorado as an unaffiliated voter for at least one (1) year prior to filing a nominating petition, alleging the statute violates Article I, § 2 of the U.S. Constitution as well as the First and Fourteenth Amendments. The Tenth Circuit determined that Colorado state law required that a party against whom the doctrine of res judicata and collateral estoppel was asserted to have a full and fair opportunity to litigate the issue in the prior adjudication, and held that the brevity of the state court action denied Thournir the full and fair opportunity required by Colorado law to litigate the constitutional issue. In our case, Gregory chose to let the case languish in state court for eleven years.

In *Jones v. City of Alton, Illinois*, 757 F.2d 878 (7th Cir. 1985), the defendants moved for a dismissal on res judicata based upon the administrative review in the state circuit court, which decision was upheld by the state appellate court. Jones contended that he was not given an opportunity to present evidence showing racial discrimination in his discharge and that the state court action erred in limiting the scope of the trial and he was denied an opportunity to present and show racial discrimination. In our case it was Gregory who sought to limit the scope of the September 21, 1979, state district court trial to the one narrow issue of whether on that very day of the hearing he consented to the settlement agreement and interlocutory judgment previously agreed to and personally signed by him. In the *Jones* case the Seventh Circuit stated that a state court judgment must be given the same res judicata effect in federal court that it would be given in the courts of the rendering states.

Apparently Petitioner does not urge *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929 (3rd Cir., 1984), as one of his "split" cases,

but he did cite it along with the others. On June 20, 1978, Mrs. Boileau, took two separate actions; she filed a petition in the Pennsylvania state court to strike a prior judgment in the Court of Common Pleas, and she filed a diversity of citizenship action in the federal district court. Mrs. Boileau presented her petition to strike the judgment rendered against her in the state court, and that court determined under Pennsylvania law such an action to strike could be considered only on the basis of facts appearing on the face of the record, and that no additional evidence would be admitted. On appeal to the appellate courts of Pennsylvania, such action against her was upheld. The U. S. District Court held that she was barred by the prior actions of the state courts. The Third Circuit held the filing of the federal action on the same day as the court petition preserved the federal diversity forum for adjudication on the merits of Mrs. Boileau's challenge to the prior judgment and was not bound by any considerations of res judicata or collateral estoppel. No preclusive effect was given to the prior judgment because she did not, under Pennsylvania law, have an opportunity to refute the state judgment by the presentation of any evidence in the state proceedings, and therefore, she was not afforded any opportunity to be heard in any manner in the state court.

As is clearly evident from a review of the foregoing cases, preclusive effect to the prior state judgment was not given because the state court itself would not have given preclusive effect to the judgment or because the issues raised in the subsequent case were not litigated or in issue in the previous state action. They are instead based upon individual review of each state's issue and claim preclusion decisions. This court has ruled in *Kremer* such procedure to be the proper course, stating that 28 U.S.C. § 1738 "goes beyond common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken". 456 U.S. at 482; 102 S.Ct. at 1898.

Accordingly, there is no conflict in the decisions of the Fifth Circuit and those of the Seventh and Tenth Circuits regarding the application of claim preclusion to prior state judgments.

None of the foregoing cases are in conflict with the Fifth Circuit's decision in this case, in that the factual basis for Gregory's § 1983 claims have already been adjudicated in prior state actions and must be conceded against him. Gregory cannot assert a § 1983 claim by the concession of the factual matters and issues previously adjudicated. In addition, Gregory was afforded a full and fair opportunity to present evidence and challenge the validity of the interlocutory judgment in the prior state action, and he failed to do so. The issues of right to trial on the merits, a jury trial and due process under both the Texas Constitution and the United States Constitution have been fully raised heretofore in the Texas proceedings and adjudicated. Accordingly, the cases cited by Gregory have no merit or application to his case for purposes of granting a writ.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectively submitted,

HARRY J. SCHULZ*

Schulz & Schulz

P.O. Box 580

Three Rivers, Texas 78071

(512) 786-2545

Attorneys for Respondent

Thomas J. Drury

DAVIS GRANT*

R. Mark Dietz

1010 United Bank Tower

Austin, Texas 78701

(512) 474-1156

Attorneys for Respondent

Lee H. Lytton, Jr.

J. G. ADAMI, JR.*

Perkins, Oden, Warburton,

McNeill & Adami

P.O. Drawer 331

Alice, Texas 78333

(512) 668-8101

Attorneys for Respondents

Bruno R. Goldapp, Elena S.

Kenedy, Kenneth Oden and

The Alice National Bank

* *Counsel of Record*

June 15, 1987

FILED

JUN 15 1987

No. 86-1673

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of The United States

OCTOBER TERM, 1986

CHRISTOPHER GREGORY,

Petitioner,

v.

THOMAS J. DRURY, *et al.*,

Respondents.

**RESPONDENTS' JOINT APPENDICES TO
RESPONDENTS' BRIEF IN OPPOSITION
TO CHRISTOPHER GREGORY'S PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

HARRY J. SCHULZ*
SCHULZ & SCHULZ
P.O. Box 580
Three Rivers, Texas 78071
(512) 786-2545
Attorneys for Respondent
Thomas J. Drury

DAVIS GRANT*
R. MARK DIETZ
1010 United Bank Tower
Austin, Texas 78701
(512) 474-1156
Attorneys for Respondent
Lee H. Lytton, Jr.

** Counsel of Record*

June 15, 1987

J. G. ADAMI, JR.*
PERKINS, ODEN, WARBURTON,
MCNEIL & ADAMI
P.O. Box 331
Alice, Texas 78333
(512) 241-2251
Attorneys for Respondents
Bruno R. Goldapp, Elena S.
Kennedy, Kenneth Oden and
The Alice National Bank

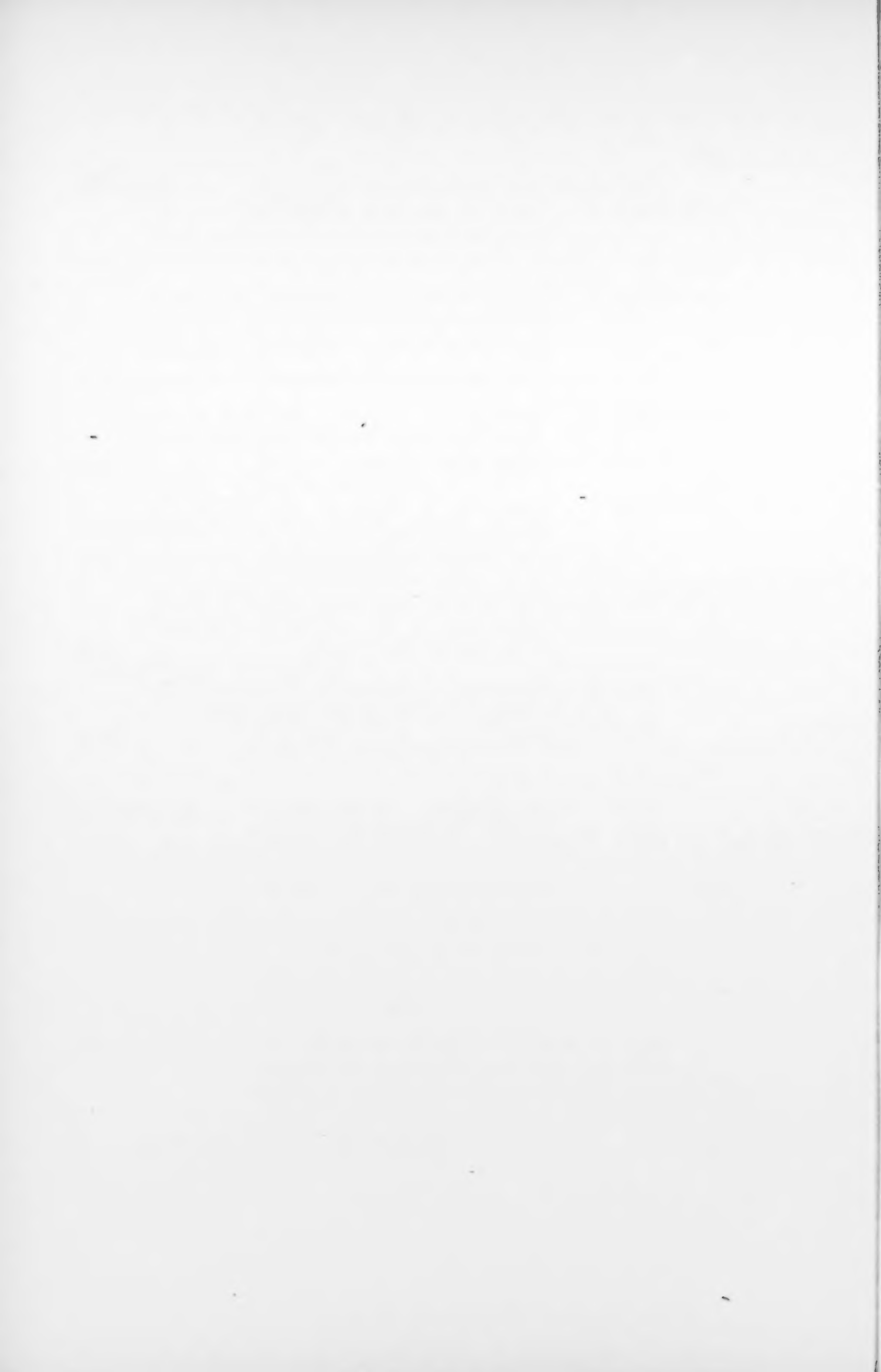
21902

TABLE OF CONTENTS

	<u>Page</u>
APPENDIX A	OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 1a
APPENDIX B	UNREPORTED FINAL JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.... 12a
APPENDIX C	UNREPORTED INTERLOCUTORY JUDGMENT OF THE 79TH JUDICIAL DISTRICT COURT OF JIM WELLS COUNTY, TEXAS, CAUSE NO. 12,074 ENTERED ON SEPTEMBER 1, 1964 ... 15a
APPENDIX D	AFFIDAVIT IN SUPPORT OF THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION ET AL., MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS PURSUANT TO RULE 12 (C), FILED IN THIS CAUSE, CIVIL ACTION C-82-84 39a
APPENDIX E	GREGORY'S MOTION TO SET ASIDE INTERLOCUTORY JUDGMENT FILED IN CONNECTION WITH TRIAL PROCEEDINGS IN CAUSE NO. 12,074 42a
APPENDIX F	GREGORY'S AMENDED MOTION TO SET ASIDE INTERLOCUTORY JUDGMENT FILED IN TRIAL PROCEEDINGS IN CAUSE NO. 12,074 46a
APPENDIX G	KENEDY MEMORIAL FOUNDATION ET AL, ANSWER TO GREGORY'S MOTION TO SET ASIDE INTERLOCUTORY JUDGMENT FILED IN THE TRIAL PROCEEDINGS IN CAUSE NO. 12,074..... 52a

	<u>Page</u>
APPENDIX H	KENEDY MEMORIAL FOUNDATION ET AL, ANSWER TO TEXAS ATTOR- NEY GENERAL'S MOTION FOR FI- NAL JUDGMENT AND MOTION TO DISMISS GREGORY'S MOTION TO SET ASIDE INTERLOCUTORY JUDG- MENT IN CAUSE NO. 12,074 55a
APPENDIX I	UNREPORTED FINAL JUDGMENT OF THE 79TH JUDICIAL DISTRICT COURT OF JIM WELLS COUNTY, TEXAS, CAUSE NO. 12,074 ENTERED ON NOVEMBER 28, 1979 58a
APPENDIX J	GREGORY'S BRIEF FILED IN THE TEXAS COURT OF CIVIL APPEALS IN SAN ANTONIO, TEXAS ON APPEAL OF FINAL JUDGMENT IN CAUSE NO. 12,074..... 68a
APPENDIX K	GREGORY v. WHITE, 604 S.W. 2d 402 (TEX. CIV. APP. SAN ANTONIO 1980, <i>WRIT REF. N.R.E.</i>), <i>CERT. DENIED</i> , 452 U.S. 939 (1981) (APPEAL OF CAUSE NO. 12,074) 86a
APPENDIX L	GREGORY'S APPLICATION FOR WRIT OF ERROR FILED IN THE TEXAS SUPREME COURT ON AP- PEAL OF CAUSE NO. 12,074..... 93a
APPENDIX M	DENIAL OF GREGORY'S APPLICA- TION FOR WRIT OF ERROR BY SU- PREME COURT OF TEXAS, CAUSE NO. 12,074; WRIT DENIED, N.R.E. 113a
APPENDIX N	GREGORY'S (FIRST) PETITION FOR WRIT OF CERTIORARI TO U.S. SU- PREME COURT; FROM CAUSE NO. 12,074, JIM WELLS COUNTY TEXAS DISTRICT COURT 114a

	<u>Page</u>
APPENDIX O DENIAL BY U.S. SUPREME COURT OF GREGORY'S PETITION FOR WRIT OF CERTIORARI (452 US 939).....	191a
APPENDIX P GREGORY'S AMENDED COMPLAINT IN CIVIL ACTION C-82-84 IN THE U.S. DISTRICT COURT, CORPUS CHRISTI, DIVISION, SOUTHERN DISTRICT....	192a
APPENDIX Q GREGORY v. LYTTON, 422 S.W.2d 586 (TEX. CIV. APP. SAN ANTONIO 1967, <i>WRIT REF. N.R.E.</i>)	204a
APPENDIX R TURCOTTE v. TREVINO, 499 S.W.2d 705 (TEX. CIV. APP. CORPUS CHRISTI 1971, <i>WRIT REF'D N.R.E.</i>)	214a
APPENDIX S TURCOTTE v. TREVINO, 544 S.W.2d 463 (TEX. CIV. APP. CORPUS CHRISTI 1976, <i>WRIT GRANTED</i>)	252a
APPENDIX T TURCOTTE v. TREVINO, 564 S.W.2d 682 (TEX. 1978) REH. DENIED APRIL 26, 1978	291a



APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2081

CHRISTOPHER GREGORY,
Plaintiff-Appellant,

versus

THOMAS J. DRURY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

(January 27, 1987)

Before CLARK, Chief Judge, WISDOM and HIGGIN-
BOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

We review the dismissal under Rule 12, Fed. R. Civ. P. of a suit by a former Trappist Monk, Christopher Gregory, also known as Brother Leo. The suit named as defendants the Attorney General of the State of Texas, the Alice National Bank and then members of the John G. and Marie Stella Kenedy Memorial Founda-

tion, including, among others, the Bishop of the Diocese of Corpus Christi. The complaint alleged that defendants conspired to deprive Brother Leo of a fair trial in a civil suit contesting control of a Texas foundation, depriving him of rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and secured by a private right of action under Title 42 U.S.C. 1983, as well as his right to a trial by jury under state law.

The full story of this Texas-size will contest would challenge the imagination of even Larry McMurtry and has a cast that rivals his epic Lonesome Dove. But we enter at the very end of this legal saga, the end despite the entry of fresh counsel with ingenious arguments who try to salvage too much, too late, and with too little. We will tell only a small part of the story because as we see the case before us, the controlling issues need little factual flesh to be understood and decided. As we will explain, we are persuaded that the complaint stated no claim, and on that basis we affirm the district court's dismissal of the suit.

I

Mrs. Sarita Kenedy East was a resident of Sarita, located in Kenedy County, Texas. On January 22, 1960, at the age of 71, she created the John G. and Marie Stella Kenedy Memorial Foundation, a charitable organization under the Texas Non-Profit Corporation Act. She simultaneously executed a will naming the Foundation as the residuary devisee and legatee, provisions that would pass assets then worth in excess of twenty million dollars, assets now valued in excess of three hundred million dollars. Under Texas law and the by-laws of the Foundation, control of the Foundation rested with its members, who had full power to appoint the Foundation's directors. Mrs. East initially named herself as the sole member, but in February she added as members,

Lee H. Lytton, Jr., a relative, and Jacob Floyd, one of her attorneys. Lytton and Floyd were members only until June 30, 1960 when, at the request of Mrs. East, they resigned. She remained as the sole member of the Foundation until the end of the year when, by a codicil executed from her hospital bed in New York, she appointed Brother Leo as an additional member. Mrs. East died on February 11, 1961, leaving Brother Leo in control of the Foundation. Her will was admitted to probate by the County Court of Kenedy County on March 6, 1961. The will was soon contested by some thirty-nine persons, hopeful seekers that later grew to over one hundred persons, claiming to be heirs at law and seeking to set aside the will on the grounds of fraud, undue influence and lack of testamentary capacity. Of course, the Foundation's future turned on the validity of Mrs. East's 1960 will.

Meanwhile Lytton, represented by Floyd, sued in the 79th Judicial District Court of Jim Wells County, Texas alleging that Brother Leo had exercised undue influence over Mrs. East in persuading her to change the membership of the Foundation. Brother Leo then retained William R. Joyce, a lawyer from Washington D.C.

It is from these facts that the conspiracy to deprive Brother Leo of his constitutional rights, alleged in the suit before us, is said to have been born. According to Brother Leo, the practical difficulties of simultaneously defending the will from charges of undue influence, fraud and lack of capacity, while prosecuting similar charges leveled against Mrs. East's appointment of members of the Foundation during the same time period, fueled the efforts to settle the contest over Mrs. East's changes in the membership of the Foundation.

A tentative settlement of the suit over membership was reached among all parties except Brother Leo. He alleges that he initially refused to settle, but finally

agreed in September 1963 after he was assigned to a remote monastery in Chile and then on threat of excommunication; that in any event his agreement was conditioned upon approval of the Holy See. While it is undisputed that Brother Leo signed a settlement agreement and agreed judgment to be filed in the 79th District Court, Brother Leo asserts that before it was filed he had revoked his consent to entry of the consent judgment, and in a meeting in Miami, Florida in January 1964 he had expressly forbade Robert Jewett of the law firm of Baker and Botts from representing him; that for his obstinance he was sent to a monastery in Northern Canada and forbidden to discuss the case. He asserts that his Abbot, Dom Thomas Keating, on August 31, 1964, "falsely" sent a telegram to Jewett purporting to consent to the entry of the judgment on behalf of Brother Leo "as the superior of Christopher Gregory . . . in virtue of an understanding which I have with him." The agreed judgment was presented to the trial court and filed on September 1, 1964, without notice to Joyce, Brother Leo's Washington D.C. counsel, and while he was incommunicado in the Canadian monastery. He asserts that he learned of the judgment entered in Jim Wells County only through an article in the New York Times.

In March 1966 Gregory filed a separate suit, termed a bill of review, seeking review of the interlocutory judgment of September 1, 1964. The judgment had been made interlocutory pending the outcome of the will contests. See, e.g., *Turcotte v. Trevino*, 499 S.W.2d 705 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). In *Gregory v. Lytton*, 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) the Texas Court of Civil Appeals affirmed the state district court's dismissal of the suit, on the basis that a bill of review did not lie to attack an interlocutory judgment.

On August 1, 1968, Brother Leo filed in the original suit in the District Court of Jim Wells County, the suit

attacking Mrs. East's changes in Foundation membership, a motion to set aside the interlocutory judgment entered by that court on September 1, 1964. In his motion to set aside, Brother Leo alleged, *inter alia*, that his consent to the settlement agreement and agreed judgment were obtained by duress and without his effective consent. Here the matter rested for some eleven years.

On July 24, 1979, and after all the contests of the 1960 will had been concluded, the Attorney General of Texas filed a Motion for Entry of Final Judgment and to Dismiss Gregory's Motion to Set Aside Interlocutory Judgment. With a hearing on this motion scheduled for September 21, 1979, Brother Leo filed on September 13, 1979, an amended motion to set aside the agreed judgment. The amended motion for the first time requested trial by jury. The Alice National Bank, as independent executor of the East estate, Kenneth Oden, counsel to the bank, the Kenedy Memorial Foundation, Thomas J. Drury, Bishop of the Diocese of Corpus Christi, Lytton and the president of the bank intervened in the suit and answered Gregory's motion, denying all its allegations.

Brother Leo did not question this joinder of issues and all parties appeared at the hearing on September 21, 1979, including Brother Leo. Brother Leo testified at the hearing that while he had personally signed the agreed interlocutory judgment, he did not consent as of September 21, 1979, to the entry of the final judgment. Although he requested a jury, Gregory's counsel argued that he was only prepared for a hearing; that he had no notice that there would be a full trial of the issues. Regardless, he requested no continuance and did not press his jury demand. Brother Leo's Texas counsel argued that he was entitled to a "full" trial of the consent issue but that in any event, under Texas law the interlocutory judgment could not be made final absent his consent when final judgment was entered, a consent that was indisputably absent. The trial court rejected his argu-

ment and entered final judgment from which Brother Leo appealed.

In his appeal Brother Leo argued to the San Antonio Court of Civil Appeals that his consent when the judgment was made final was required, that he had been denied due process of law and his right to jury trial under both the Texas and United States Constitutions. That court affirmed. *Gregory v. White*, 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, writ ref'd. n.r.e.), cert. denied, 452 U.S. 939 (1981). The panel was unanimous that the evidence conclusively demonstrated that Gregory had executed the settlement agreement and "neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered." *Id.* at 404. In sum, the court rejected the contention that Brother Leo's attorneys' lacked authority to represent him when the interlocutory judgment was filed and that, it held, was the critical time under Texas law.

In his application for writ of error to the Texas Supreme Court, Brother Leo urged that the Court of Civil Appeals had erred in five respects. First, it erred in affirming the trial courts' entry of final judgment without conducting a trial on the merits. Second, it erred in not requiring a full trial when the trial judge knew that a lack of consent was being asserted. Third, it erred in holding that under Texas law the jury demand was untimely. Fourth, it erred in rejecting his argument that entry of the final judgment denied him due process of law. Fifth, it erred in holding that a consent to entry of an interlocutory judgment was to be treated under Texas law as a consent to entry of a final judgment. The Texas Supreme Court refused the writ application with its notation of n.r.e.

In his Petition of Writ of Certiorari, Brother Leo, represented by his present counsel, urged that "The ac-

tions of the Courts below violated the due process clause of the Fourteenth Amendment to the United States Constitution," that he was denied due process and his right under state law to trial by jury. After denial of certiorari, Brother Leo filed this suit under 42 U.S.C. 1983.

II

Brother Leo alleged in his federal suit that he was "deprived . . . of his rights to trial and trial by jury in violation of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution." He argues that he never had a trial on the issues of his undue influence of Mrs. East, that he lacked adequate notice of the hearing of September 1, 1964, particularly given that once the interlocutory judgment was entered he was barred from attacking it, "either by way of appeal or when it was converted into a final judgment."

Defendants urged dismissal contending that no claim for constitutional wrong had been stated; that any claim was barred by laches and limitations and precluded by principles of *res judicata* and collateral estoppel.

We are persuaded that Brother Leo's effort to state a claim that Texas has deprived him of his rights to a hearing and to a trial by jury must fail.¹ The undis-

¹ All parties here and below have referred to matters extrinsic to the complaint. They were also considered by the district court in its grant of a motion to dismiss. Ordinarily, the defense of *res judicata* cannot be determined on a motion to dismiss for failure to state a claim. Here, the state court decisions were virtually apparent on the face of the complaint. In any event, all parties have treated the skeleton facts outlining the history of the state court decisions as a statement of the set of facts that Brother Leo might adduce under the complaint.

We could, with equal confidence, treat the ruling below as a grant of summary judgment. All parties had a full opportunity to present their arguments below and there is no issue over the facts essential to our opinion. In this circumstance, we see no reason to

puted facts are that Texas heard his contention that his consent to entry of judgment was not effective and rejected it. A trial judge in Jim Wells County heard evidence, including the testimony of Brother Leo, and concluded that under Texas law his agreement was binding. His claims that the hearing on his motion to set aside the interlocutory judgment was inadequate under state law and the United States Constitution were thereafter heard and rejected by two levels of Texas Courts. At each stage he was represented by counsel.

Whatever the label placed on the proceeding in which Brother Leo's motion to set aside the interlocutory judgment was decided, and regardless of our view of its constitutional sufficiency, if we are bound by the state court decisions that he received a full opportunity to present his factual and legal theories—both that his earlier consent was ineffective and that his present consent was necessary—we must affirm the district court's dismissal. We turn to that issue.

III

We must give to the state court rulings that the hearings given Brother Leo on his attack upon the interlocutory judgment were adequate under the United States Constitution and state law, the preclusive effect that Texas courts would give to them. *See* U.S. Const. art. IV, § 1; 28 U.S.C. § 1738.

Allen v. McCurry, 449 U.S. 90 (1980), held that federal courts must look to state rules of issue preclusion for issues actually litigated, but left open the possibility that federal issues that might have been litigated, but were not, would be treated differently under 42 U.S.C. § 1983. The court closed that door in *Migra v. Warren City School District Board of Education*, 104 S.Ct. 892 (1984), noting that "the policy concerns underlying

linger over the distinction, and we simply affirm the judgment for defendants entered by the district court.

§ 1983 would [not] justify a distinction between the issue preclusive and the claim preclusive effect of state-court judgments." *Id.* at 897.

We have recently reviewed the Texas law of res judicata.² In *Flores v. Edinburg Consolidated Independent School District*, 741 F.2d 773 (5th Cir. 1984), we explained that issues actually litigated are barred in subsequent suits between the parties even though a different cause of action is asserted; that when the subsequent suits asserts the same cause of action, issues that might have been litigated are precluded as well. We rejected the suggestion that a suit under 42 U.S.C. § 1983 was necessarily a different cause of action from a state cause of action for tort drawn from the same facts explaining:

that "a different cause of action" is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed issues raised in the plaintiff's original complaint are conceded in the defendant's favor.

Id. at 777.

We are persuaded that measured by Texas rules of preclusion every attack now leveled in federal court against the September 21, 1979, hearing in Jim Wells County was presented to the Texas courts, and rejected. Should we add, and we need not, that Brother Leo is

² In our recent opinion in *McWilliams v. McWilliams*, 804 F.2d 1400, 1403 (5th Cir. 1986), Judge Wisdom described the competing interests in the decision to accept state law rules of both issue and claim preclusion in cases prosecuted under the Civil War Amendments concluding that "the difference between an inferior court and the United States Supreme Court effectively eliminates options in our decision-making function. We must honor the claim-preclusive effect of the state court's judgment, regardless of Section 1983."

also bound by what he might have argued in the Texas courts, his argument loses the little force it has. This is so because Brother Leo surely asserts in federal court the same cause of action he asserted in state court. He must be able to maintain his federal suit with "all the disputed issues raised in [his motion to set aside] . . . conceded in . . . defendant[s'] favor." *Id.* This he cannot do.

New and able counsel attempt to extricate Brother Leo from the reality that he has tried his constitutional and state law claims in state court, and lost. The escape argument, as we understand it, is that he does not seek a second trial of the state determined issues. Rather, it is the sum of all the rulings that is the alleged state deprivation of constitutional rights. He argues that changes in state law, with which he does not here quarrel, had the effect in *his* case of foreclosing a fair hearing; that he was placed in a legal Catch 22.

The argument is that by first rejecting his bill of review on the basis that the bill would not lie to attack an interlocutory judgment, and latter holding that his consent to the entry of the interlocutory judgment could not be defeated by objecting after its entry, Texas courts effectively held that "Gregory's first challenge was too early; his second challenge too late."

We find no such dilemma. That a bill of review attacking the interlocutory judgment was not allowed did not foreclose his motion to set aside the judgment filed in that case—as demonstrated by the fact that it was heard. Issue over the effectiveness of Brother Leo's consent to entry of the interlocutory judgment was joined on his motion to set aside. He then tried in the Texas courts the issue of the adequacy of that hearing under state law and the United States Constitution. Under § 1738 and the full faith and credit clause, whether or not he is now asserting the same cause of action, we must accept the state courts' decisions.

We do not here face the issue of the preclusive effect under state law of a state court judgment flawed by a systemic failure of constitutional dimensions. Nothing suggests that the appellate review of the rejection of Brother Leo's motion to set aside was constitutionally suspect, whether or not one agrees with the rulings. In this critical sense, there is no question but that Brother Leo's perceived Catch 22 did not exist.

Of course, the right to a jury including the timeliness of the jury denial were state law issues decided against Brother Leo and present no constitutional issue were we free to reconsider the state rulings, and as we have explained, we are not.

In sum, Brother Leo's federal court suit is ultimately an attack on the hearing held in Jim Wells County on September 21, 1979. It is a fight that he elected to make in the Texas courts with a right of review by writ of certiorari from the Supreme Court of the United States to the Texas Supreme Court. We are not free to decide the issues a second time.

We have rejected Brother Leo's arguments, but we are not persuaded that his appeal was frivolous. Defendants' request for double costs and counsel fees is rejected.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action C-82-84

CHRISTOPHER GREGORY

v.

THOMAS J. DRURY, *et al.*

[Filed Jan. 27, 1986]

FINAL JUDGMENT

In accordance with the Order filed on January 24, 1986, it is ORDERED that judgment be entered.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 24th day of January, 1986.

/s/ Carl O. Bue, Jr.
CARL O. BUE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action C-82-84

CHRISTOPHER GREGORY

VS.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S.
KENEDY, LEE H. LYTTON, JR., KENNETH ODEN, MARK
WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,
AND ALICE NATIONAL BANK

[Filed Jan. 27, 1986]

ORDER

On the 9th day of January, 1986, pursuant to notice to all parties of the consideration of all pending motions by the Court, there came on to be heard Defendants' Motion for Judgment on the Pleadings and Dismissal, and the Plaintiff appearing by his counsel of record and all Defendants' [sic] appearing by their respective counsel of record, and the Court having examined all the pleadings herein and the affidavits submitted in support and opposition thereof, and the Court having reviewed the Briefs of the respective parties, and having heard the arguments of Counsel, and being otherwise fully advised in the premises, the Court finds that the Plaintiff is not entitled to the relief which he claims and that the Defendants' [sic] are entitled to a Judgment in their favor and a Dismissal of Plaintiff's Suit;

IT IS HEREBY ORDERED, that Defendants' Motion for Judgment on the Pleadings is SUSTAINED, and this cause is DISMISSED with prejudice at Plaintiff's cost. The Court having considered all other motions and matters pending herein, all other relief which has not been expressly granted herein, or which is inconsistent with the Dismissal of this cause, is expressly DENIED.

DATED the 24th day of January, 1986.

**/s/ Carl O. Bue, Jr.
CARL O. BUE, Jr.
District Judge Presiding**

APPENDIX C

Entered September 1, 1964

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION, *et al.*

JUDGMENT

BE IT REMEMBERED that on this 1st day of September, 1964, there came on to be heard the above entitled and numbered cause, wherein Lee H. Lytton, Jr. is plaintiff and cross-defendant, Jacob S. Floyd is defendant and cross-plaintiff, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, is intervenor, and The John G. and Marie Stella Kenedy Memorial Foundation, T. M. Doyle, John J. Meehan, J. Peter Grace, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, Lawrence E. Wood and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., are defendants and cross-defendants, and wherein the Attorney General of the State of Texas is joined as a party, having been served with process and citation in accordance with the terms of Article 4412a, Section 3, Vernon's Civil Statutes of Texas, these being

all of the parties of record in this suit, and it appearing to the court that T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong and Lawrence E. Wood have this day, in open court, resigned from, and renounced their rights to, their respective offices as members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, and that the plaintiff and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, by and through their attorneys of record, announced in open court that they, the said plaintiffs and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, no longer wished to prosecute this suit as against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood and requested that the court dismiss this suit, with prejudice, as against said parties;

It is accordingly ORDERED, ADJUDGED and DECREED by the court that this suit be and the same is hereby dismissed, with prejudice, against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood.

And then came the remaining parties to this action, to-wit, plaintiff and cross-defendant Lee H. Lytton, Jr., defendant and cross-plaintiff Jacob S. Floyd, intervenor Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, defendants and cross-defendants The John G. and Marie Stella Kenedy Memorial Foundation, Christopher Gregory, sometimes known as Brother Leo O.C.S.O., J. Peter Grace and the Attorney General of the State of Texas, all by and through

their respective attorneys of record, and announced ready for trial; whereupon, a jury being waived by all parties, it was announced to the court that the parties hereto had agreed to compromise and settle all issues raised herein, as well as all issues made the basis of this suit, it being distinctly understood that in making this settlement no party makes any admission with regard to any of the allegations made in the pleadings on file in this suit; and it further appearing that Lee H. Lytton, Jr. and Jacob S. Floyd have this day, in open court, ratified their resignations, dated June 13, 1960, as members of The John G. and Marie Stella Kenedy Memorial Foundation, and that the sole and only members of said The John G. and Marie Stella Kenedy Memorial Foundation now remaining are J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O.; and it further appearing to the court that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereupon, in open court, appointed, in compliance with the By-Laws of said The John G. and Marie Stella Kenedy Memorial Foundation, the following persons as members of such Foundation, to-wit:

Most Reverend M. S. Garriga, Roman Catholic
Bishop of the Diocese of Corpus Christi, and/or his
successors in office

Elena S. Kenedy

Lee H. Lytton, Jr.

Kenneth Oden

B.R. Goldapp

and it further appearing that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereafter, in open court, resigned from their respective offices as members and/or directors of said The John G. and Marie Stella Kenedy Memorial Foundation in compliance with the By-Laws of such Foundation; and it further appearing to the court that the aforesaid members, to-wit, Most Reverend M. S. Garriga, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth

Oden and B.R. Goldapp, have, in open court, duly elected the following named persons as directors of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-Laws thereof, to-wit:

Most Reverend M. S. Garriga, Roman Catholic
Bishop of the Diocese of Corpus Christi
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

and it further appearing to the court that the aforesaid directors, have in open court, duly elected the following officers of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-laws thereof, to-wit:

Elena S. Kenedy—*President*
Bishop M. S. Garriga—*Vice President*
Kenneth Oden—*Secretary-Treasurer*
Lee H. Lytton, Jr.—*Assistant Secretary-Treasurer*

and it appearing to the court that the members have, in open court, adopted amendments to the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation in the form of Exhibit A attached hereto and made a part hereof, and have, in open court, adopted amendments to the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation, which said amendments to the By-Laws are set forth in Exhibit B attached hereto and made a part hereof, and the court having examined said amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation are found the same to be in proper order and to reflect correctly the agreement of the parties and that such amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation should be approved and ratified by the court; and it appearing to the court, and the court having been fully advised in the premises, that the afore-

said compromise and settlement should be approved and that Judgment should be entered herein in accordance with such settlement agreed upon; and it further appearing to the court that the proper officers of the said Foundation, also in open court, in accordance with this compromise agreement and Judgment have executed the instrument, a copy of which is attached to this Judgment and made a part hereof and marked Exhibit C, and which instrument has been examined by the court and found to be in proper order and to reflect correctly the agreement of the parties and such instrument should be approved and ratified by the court; and it further appearing to the court that all parties to this action acting by and through their duly authorized attorneys of record, in open court, have approved this Judgment by affixing their signatures hereto; and it further appearing to the court that the Attorney General of Texas, in open court, by and through his designated Assistant Attorney General, has stated that the Attorney General's Office has reviewed the terms, conditions and provisions of this settlement and all exhibits attached hereto, and that the said terms, conditions and provisions have been found to be in the best interests of the public beneficiaries of Texas, and therefore the Attorney General of Texas does hereby ratify and grant to this settlement according to the provisions of Article 4412a, Vernon's Civil Statutes of Texas, and the court being of the opinion that upon the recommendation of the Attorney General of Texas this settlement be in all things approved;

It is accordingly ORDERED, ADJUDGED and DECREED by the court—

(1) That on the date of this Judgment, and pursuant to the appointment of members and election of directors and officers as aforesaid, the present and only duly and legally authorized and elected members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation are as follows:

Members: Most REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP

Directors: MOST REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi
ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP

Officers: ELENA S. KENEDY—*President*
BISHOP M.S. GARRIGA—*Vice President*
KENNETH ODEN—*Secretary-Treasurer*
LEE H. LYTTON, JR.—*Assistant Secretary-Treasurer*

(2) That the meetings and acts of the members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, as reflected by the minutes thereof, held or done in open court this day, be and they are in all things confirmed, ratified and approved as the legal and binding acts of The John G. and Marie Stella Kenedy Memorial Foundation.

(3) That the instrument executed by the President of The John G. and Marie Stella Kenedy Memorial Foundation and attested by its Secretary be and it is hereby declared to be the legal act of The John G. and Marie Stella Kenedy Memorial Foundation, a copy of such instrument, marked Exhibit C, being attached to and all of its terms being made a part of this Judgment, as if fully incorporated herein.

(4) That this suit, as to all issues raised herein by any party herein, be and the same is hereby dismissed, with prejudice, as against the said J. Peter Grace and

Christopher Gregory, sometimes known as Brother Leo O.C.S.O. The John G. and Marie Stella Kenedy Memorial Foundation is hereby dismissed as a party defendant.

APPROVED AS TO FORM AND SUBSTANCE:

s/ LEE H. LYTTON, JR.
LEE H. LYTTON, JR.
Plaintiff

By s/ JACOB S. FLOYD
JACOB S. FLOYD
Defendant and Cross-Plaintiff

PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas

By s/ KENNETH ODEN
KENNETH ODEN
Attorneys for Plaintiff Lee H. Lytton, Jr.,
Defendant and Cross-Plaintiff Jacob S. Floyd and
Executors of the Estate of Sarita Kenedy East,
Deceased

By s/ M. S. GARRIGA
M.S. GARRIGA, Roman Catholic Bishop of the
Diocese of Corpus Christi
Intervenor

By s/ ELMORE BORCHERS
ELMORE BORCHERS
Laredo, Texas
and

s/ PATRICK J. HORKIN, JR.
PATRICK J. HORKIN, JR.
717 Commerce Building
Corpus Christi, Texas
Attorneys for Intervenor M. S. Garriga, Roman
Catholic Bishop of the Diocese of Corpus Christi

- s/ T. M. DOYLE
T. M. DOYLE
Defendant and Cross-Defendant
- s/ JOHN J. MEEHAN
JOHN J. MEEHAN
Defendant and Cross-Defendant
- s/ J. PETER GRACE
J. PETER GRACE
Defendant and Cross-Defendant
- s/ REV. PATRICK J. PEYTON, C.S.C.
REV. PATRICK J. PEYTON, C.S.C.
Defendant and Cross-Defendant,
Acting Individually and as a Member of the
Congregation of Holy Cross Under Valid Authority
of His Lawful Religious Superior
- s/ CHRISTOPHER GREGORY
CHRISTOPHER GREGORY
Sometimes Known as Brother Leo, O.C.S.O.,
Defendant and Cross-Defendant, Acting
Individually and as a Religious of the Cistercian
Order of the Strict Observance Under Valid
Authority of His Lawful Religious Superior

BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

- s/ DENMAN MOODY
DENMAN MOODY
Attorneys for Defendants and Cross-Defendants
Doyle, Meehan, Grace, Peyton and Gregory
HENRIETTA K. ARMSTRONG
Defendant and Cross-Defendant
THOMAS M. ARMSTRONG
Defendant and Cross-Defendant (pro forma)
LAWRENCE E. WOOD
Defendant and Cross-Defendant

KLEBERG, MOBLEY, LOCKETT & WEIL
Jones Building
Corpus Christi, Texas

By:

M. HARVEY WEIL
Attorneys for Defendants and Cross-Defendants
Henrietta K. Armstrong, Joined Pro Forma By
Her Husband, Thomas M. Armstrong, and
Lawrence Wood

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION
Defendant and Cross-Defendant

By: BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

s/ DENMAN MOODY
DENMAN MOODY

WAGGONER CARR
Attorney General of the State of Texas

By:s/ J. GORDON ZUBER
J. GORDON ZUBER
Assistant Attorney General

s/ JACOB S. FLOYD
JACOB S. FLOYD
Independent Executor of the Estate of
Sarita Kenedy East, Deceased

ALICE NATIONAL BANK OF ALICE, TEXAS
Independent Executor of the Estate of Sarita Kenedy
East, Deceased

By:s/ B.R. GOLDAPP
B.R. GOLDAPP

V

All temporary restraining orders heretofore issued by this Court are hereby vacated and dissolved, and by agreement of the parties hereto, they are hereby enjoined and restrained from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees, and representatives, insofar as any such monies and/or royalties have heretofore been or may hereafter be received under the terms of any and all of the three following described instruments, to-wit:

- (1) That certain instrument dated April 21, 1960, recorded in the Oil & Gas Records of Kenedy County, Texas, in Volume 9, Pages 544 et seq.,
- (2) That certain instrument dated February 13, 1960, recorded in the Deed Records of Jim Hogg County, Texas, in Volume 42, Pages 52, et seq. and
- (3) That certain instrument dated January 2, 1961, recorded in the Oil & Gas Lease Records of Jim Hogg County, Texas, in Volume 50, Page 305, et seq.

EXCEPTED, HOWEVER, from this temporary injunction and the terms and provisions thereof are any and all monies expended heretofore, or which may be expended hereafter, for the payment of taxes, or for payment of compensation to bookkeepers or auditors, and for investment in term United States Government securities; and they are further restrained and enjoined from assigning, transferring, conveying, pledging, mortgaging, or hypothecating any part or portion of the rights and/or properties purporting to pass from Sarita K. East or The John G. and Marie Stella Kenedy Memorial Foundation under the terms of any and all of said three instruments

above described; PROVIDED, HOWEVER, that nothing contained in the temporary injunction shall in any wise be construed to affect, interfere with, or terminate in any manner, the existing rights of the said John G. and Marie Stella Kenedy Memorial Foundation, its officers, members, directors, agents, and representatives, to demand, collect, and receive all monies and/or royalties due, or to become due, from any person, firm, or corporation, under the terms of said three written instruments above described.

This is an interlocutory order and shall remain in full force and effect until further ordered by this Court.

VI

All costs of suit shall abide the issue.

VII

And it further appearing to the court that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled, Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, as a result of which, the parties hereto have refrained from executing and delivering the assignment, a copy of which is attached to this Judgment as Exhibit C;

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that all language hereinabove contained inconsistent with this finding is hereby amended and modified to conform hereto, and the proper parties and persons are hereby authorized and directed to execute, acknowledge and deliver such assignment upon the vacation or avoidance of such temporary injunction and the temporary injunction hereinabove provided for.

RENDERED AND SIGNED this 1st day of September, 1964.

s/ C. W. Laughlin
C. W. LAUGHLIN, *District Judge.*

**ARTICLES OF AMENDMENT TO THE ARTICLES
OF INCORPORATION OF THE JOHN G. AND
MARIE STELLA KENEDY
MEMORIAL FOUNDATION**

Pursuant to the provisions of Article 4.03 of the Texas Non-Profit Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation which add thereto a new Article IX dealing with the membership of the Foundation and a new Article X dealing with the contributions to be made by the Foundation:

1. The name of the Corporation is The John G. and Marie Stella Kenedy Memorial Foundation.
2. The following amendment to the Articles of Incorporation was adopted by the Corporation on Sept. 1, 1964.

The Articles of Incorporation are hereby amended by adding thereto a new Article IX and a new Article X reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

- (ii) at least two other practical Catholics;
- (iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent ($33\frac{1}{3}\%$) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

3. The amendment was adopted in the following manner:

The amendment was adopted at a meeting of the members of the Foundation held on September 1, 1964, at which a quorum was present, and the amendment received at least two-thirds of the votes which members present or represented by proxy at such meeting were entitled to cast.

DATED _____; 19—

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION

By _____
Its President

Its Secretary

THE STATE OF TEXAS)
COUNTY OF JIM WELLS)

I, _____, a Notary Public, do hereby certify that on this ____ day of _____, 196—, personally appeared before me _____, and being duly sworn, declared that he is President of the Corporation executing the foregoing document, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public in and for
Jim Wells County, Texas
My Commission Expires: _____

(Notarial Seal)

**THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION**

Certified Copy of Amendments to By-Laws

I, _____, Secretary of The John G. and Marie Stella Kenedy Memorial Foundation, a non-profit, charitable corporation organized and existing under the laws of the State of Texas, do hereby certify that at a meeting of the members and directors of such Foundation which was duly held in accordance with its By-Laws, the By-Laws of such Foundation were duly amended to cause Article III thereof to be amended to add as a part thereof new paragraphs 1a, 1b, and 1c reading as hereinbelow set forth, to add a new Article XI thereto reading as hereinbelow set forth, and to re-number the present Article XI of such By-Laws as Article XII, and that such amendments to its By-Laws of such Foundation are duly effective and have not been rescinded or modified in any manner.

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, and said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent ($33\frac{1}{3}\%$) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

EXECUTED this — day of ———, 19—.

_____, Secretary
The John G. and Marie Stella
Kenedy Memorial Foundation

(SEAL)

THE STATE OF TEXAS)
COUNTY OF JIM HOGG)

KNOW ALL MEN BY THESE PRESENTS: That The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Jacob S. Floyd and Alice National Bank, a national banking association with its place of business in Alice, Texas, jointly acting herein only in their capacity as executors of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars (\$10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation, Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas, (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 519-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other minerals produced and saved from the above described lands.

This sale conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seventh-eighths ($7/8$ ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said Lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seventh-eighths ($7/8$ ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths ($7/8$ ths) interest shall bear only its proportionate seven-eighths ($7/8$ ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

Recorded in Deed or
Lease * Records of
Jim Hogg County at

GRANTEE	DATE OF INSTRUMENT	VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnât	October 19, 1947	28	525 et seq.
Irene Putegnât	September 1, 1957	28	527 et seq.
Fannie D. Putegnât, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnât, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars (\$25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above lands which provides (i) for a royalty of less than one-eighth ($1/8$ th) of all oil produced, saved and sold, of less than one-eighth ($1/8$ th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth ($1/8$ th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of

\$10,000 or \$2 per acre for the lands leased, whichever shall be the lesser amount, (iii) for delay rentals in excess of \$2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successor and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven eighths ($7/8$ ths) of one-eighth ($1/8$ th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00) provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by

Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of the title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated — day of —, 1963, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand

Dollars (\$14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all of any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the — day of —, 196 .

**THE JOHN G. AND MARIE
STELLA KENEDY MEMORIAL
FOUNDATION**

ATTEST:

By: _____
President

GRANTOR

Secretary

ALICE NATIONAL BANK

ATTEST:

By: _____
President

Cashier

**Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961**

FILED

at 3:45 o'clock p.m.

SEP 1 1964

**Pauline Clinkscles
Clerk District Court
Jim Wells County, Tex.**

BY _____ DEPUTY

APPENDIX D

AFFIDAVIT IN SUPPORT OF THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION ET AL., MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS PURSUANT TO RULE 12(c)

THE STATE OF TEXAS }
COUNTY OF JIM. WELLS... }

BEFORE ME, the undersigned authority, personally appeared J. G. Adami, Jr., who first being duly sworn, did state upon his oath that he is one of the counsel of record for the Defendants in the above-entitled and numbered cause, and that he was engaged as co-counsel in Cause No. 12,074 in the District Court of Jim Wells County, Texas, and all appeals therefrom, and that he has personal knowledge of the pleadings, memoranda of law, briefs of law, and related documents filed in connection with such proceeding. In connection with Exhibits "A" through "G," inclusive, Affiant would show unto the Court the following:

1. Exhibit "A" is a true and correct copy of Appellant's (Gregory) Brief filed in the Texas Court of Civil Appeals in San Antonio, this being an appeal of Final Judgment of Cause No. 12,074;

2. Exhibit "B" is a true and correct copy of Appellant's (Gregory) Application for Writ of Error filed in the Texas Supreme Court, on appeal from Cause No. 12,074;

3. Exhibit "C" is a true and correct copy of Gregory's Petition for Writ of Certiorari, filed in the United States Supreme Court on appeal from Final Judgment in Cause No. 12,074;

4. Exhibit "D" is a true and correct copy of Gregory's Motion to Set Aside Interlocutory Judgment filed in connection with trial proceedings of Cause No. 12,074;

5. Exhibit "E" is a true and correct copy of Gregory's Amended Motion to Set Aside Interlocutory Judgment filed in the trial proceedings of Cause No. 12,074;

6. Exhibit "F" is a true and correct copy of the Defendants', Kenedy Memorial Foundation et al., Answer to the Gregory Motion to Set Aside Interlocutory Judgment filed in the trial proceedings of Cause No. 12,074;

7. Exhibit "G" is a true and correct copy of the Defendants, Kenedy Memorial Foundation et al., Answer to the Texas Attorney General's Motion for Final Judgment and Motion to Dismiss Gregory's Motion to Set Aside Interlocutory Judgment, which was filed in the trial proceedings of Cause No. 12, 074.

EXECUTED this the 2nd day of February, 1982.

J. G. ADAMI, JR.

J. G. ADAMI, JR.

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the 2nd day of February, 1982.

LAURA M. RAY

LAURA M. RAY

Notary Public in and for
Jim Wells County, Texas

Laura M. Ray, My Commission
expires 2-28-85

CERTIFICATE OF SERVICE

I, J. G. Adami, Jr., do hereby certify that a true and correct copy of the foregoing Brief of Defendants, Elena S. Kenedy, Bruno R. Goldapp, Kenneth Oden, and Alice National Bank in Support of Motion to Dismiss Pursuant to Rule 12 has been sent prepaid, certified mail, return receipt requested, in the United States Mail addressed as follows:

Mr. Harry Schulz
Schulz & Schulz
P.O. Drawer 580
Three Rivers, Texas 78071

Mr. James R. Weddington
Friedman, Weddington &
Hansen
515 Stewart Title Building
812 San Antonio Street
Austin, Texas 78701

Ms. Amie Rodnick
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Mr. Davis Grant
Grant, Stone & Forbes
Suite 1010 United Bank
Tower
Austin, Texas 78767
Mr. James D. St. Clair, P.C.
Ms. Barbara Moore
Hale & Dorr
60 State Street
Boston, Massachusetts 02109

on this the 2nd day of February, 1982.

J. G. ADAMI, JR.
J. G. ADAMI, JR.

APPENDIX E

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION,
et. al.

IN THE DISTRICT COURT

OF

JIM WELLS COUNTY, TEXAS

MOTION TO SET ASIDE INTERLOCUTORY JUDGMENT,
MOTION TO DISMISS A PARTY AND
ANSWER OF THE DEFENDANT CHRISTOPHER GREGORY

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CHRISTOPHER GREGORY, also known as Brother Leo, it having been finally determined that the judgment entered in this cause on the first day of September, 1964, is interlocutory and not final, and files this his motion to set aside said judgment and his answer to other pleadings on file herein and for such motion and answer would show the following:

I

MOTION TO SET ASIDE INTERLOCUTORY JUDGMENT

This Defendant moves this Honorable Court to set aside its interlocutory judgment entered herein on the first day of September, 1964, and to declare the purported agreement and the purported actions of the parties taken in connection and pursuant thereto void and of no effect for each and all of the following reasons, to wit:

A. That the agreement on which said judgment and said purported actions of the parties is based is invalid and void because:

1. The purported consent thereto of this Defendant was obtained by duress;

2. The purported consent of this Defendant was conditionally given, and the conditions to its delivery were never met;

3. That the delivery of the signed agreement on behalf of this Defendant was made by a person or persons unauthorized to make such delivery under the circumstances;

4. That the purported agreement became impossible of performance by reason of the death of Jacob S. Floyd;

5. That the purported agreement was altered and provisions changed and added thereto without consent of this Defendant or any person authorized by him; or, in the alternative,

6. That the agreement was and is incomplete and incapable of fully settling all issues in this cause and was intended to be only a temporary solution; and

B. That there is otherwise no basis in pleading or in fact for the removal of those parties acting as members and directors and substitution of other persons therefor.

II

MOTION TO DISMISS A PARTY

Comes now CHRISTOPHER GREGORY, also known as Brother Leo, and suggests to the Court the death of the Honorable Jacob S. Floyd on or about the 26th day of February, 1964, and prior to the entry of the purported judgment of September 1, 1964, and moves that by reason of the death of the said Jacob S. Floyd that he be dismissed as a party to said lawsuit; and this Defendant would further show that the Alice National Bank and Edith J. Floyd have filed a pleading in this cause recognizing said death and purporting to act as independent executors of the estate of Jacob S. Floyd, deceased, and as successor in interest to the said Jacob S. Floyd; and this Defendant would further show that such cause of action as was asserted by the said Jacob S. Floyd and

which he might have had herein was personal to the said Jacob S. Floyd and that any rights that the said Jacob S. Floyd has as a member and director of the John G. and Marie Stella Kenedy Memorial Foundation ended with his death and did not pass to or vest in his estate; and that for all of such reasons the said Jacob S. Floyd and the said Edith J. Floyd and Alice National Bank as independent executors of the estate of Jacob S. Floyd, deceased, ought to be dismissed as parties to this lawsuit.

III

ANSWER

Comes this Defendant and for answer to all pleadings on file herein by other parties would deny all and singular the allegations therein contained and demand strict proof thereof.

WOOD, BOYKIN, RYLEE & WOLTER
Marshall Boykin III
1721 Wilson Tower
Corpus Christi, Texas 78401

FRANCES TARLTON FARENTHOLD
807 The 600 Building
Corpus Christi, Texas 78401

By FRANCES TARLTON FARENTHOLD
FRANCES TARLTON FARENTHOLD

Attorneys for Christopher Gregory

STATEMENT OF SERVICE

THIS WILL CERTIFY that service of the foregoing Motion to Set Aside Interlocutory Judgment, Motion to Dismiss A Party and Answer of The Defendant Christopher Gregory was completed on the above-named parties and/or attorneys of record in the above cause by depositing in the United States Mail on the 1st day of August, 1968, Certified Mail, Return Receipt Requested, postage prepaid, a true and correct copy of motion addressed to said persons and attorneys at the following addresses:

Honorable Crawford Martin, Office of The Attorney
General, Austin, Texas;

Kenneth Oden and Perkins, Floyd, Davis & Oden,
P.O. Box 331, Alice, Texas;

Denman Moody and Baker, Botts, Shepherd & Coates,
1600 Esperson Building, Houston, Texas;

Patrick J. Horkin, Jr. and Horkin, Nicolas & Morris,
P.O. Box 28, Corpus Christi, Texas;

Elmore H. Borchers, P.O. Box 725, Laredo, Texas;

Harry J. Schulz, P.O. Drawer 580, Three Rivers, Texas;

John J. Meehan, 3 Hanover Square, New York,
N.Y. 10004;

Thomas M. Doyle, 7 Hanover Square, New York,
N.Y. 10005;

J. Peter Grace, Jr., 7 Hanover Square, New York,
N.Y. 10005;

Rev. Patrick J. Peyton C.S.C., 773 Madison Avenue,
Albany, New York;

Thomas R. Armstrong and Henrietta K. Armstrong,
Armstrong Ranch, Armstrong, Texas; and

Lawrence E. Wood, Refugio, Texas.

FRANCES TARLTON FARENTHOLD
FRANCES TARLTON FARENTHOLD

APPENDIX F

No. 12,074

LEE H. LYTTON, JR.

VS.

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION,
et. al.

IN THE DISTRICT COURT

OF

JIM WELLS COUNTY, TEXAS

THE DEFENDANT CHRISTOPHER GREGORY'S
FIRST AMENDED MOTION TO SET ASIDE INTERLOCUTORY
JUDGMENT, MOTION TO DISMISS A PARTY AND ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CHRISTOPHER GREGORY, also known as Brother Leo, it having been finally determined that the judgment entered in this cause on this first day of September, 1964, is interlocutory and not final, and files this his motion to set aside said judgment and his answer to other pleadings on file herein and for such motion and answer would show the following:

I.

MOTION TO SET ASIDE INTERLOCUTORY JUDGEMENT

This Defendant moves this Honorable Court to set aside its interlocutory judgment entered herein on the first day of September, 1964, and to declare the purported agreement and the purported actions of the parties taken in connection and pursuant thereto void and of no effect for each and all of the following reasons, to-wit:

A. This Defendant has heretofore made known to this Court and now makes known to this Court that he no longer consents to or agrees to the alleged settlement or compro-

mise supposedly effected and evidenced by said interlocutory judgment;

B. Alternatively, that the agreement on which said judgment and said purported actions of the parties is based is invalid and void for each of the following reasons (pleaded alternatively):

1. That Defendant was not present and had not authorized the person or persons purporting to act for him at the time of entry of such interlocutory judgment and taking of actions incident thereto and recited therein;

2. That the delivery of a signed agreement on behalf of this Defendant was made by a person or persons unauthorized to make such delivery under the circumstances;

3. The purported consent thereto of this Defendant was obtained by duress;

4. The purported consent of this Defendant was conditionally given, and the conditions to its delivery were never met;

5. That the purported signed agreement became impossible of performance by reason of the death of Jacob S. Floyd;

6. That the purported signed agreement was altered and provisions changed and added thereto without consent of this Defendant or any person authorized by him; or, in the alternative,

7. That any agreement was and is incomplete and incapable of fully settling all issues in this cause and was intended to be only a temporary solution; and

C. That there is otherwise no basis in pleading or in fact for the removal of those parties acting as members and directors and substitution of other persons therefor.

II.

MOTION TO DISMISS A PARTY

Comes now CHRISTOPHER GREGORY, also known as Brother Leo, and suggests to the Court the death of the Honorable Jacob S. Floyd on or about the 26th day of February, 1964, and prior to the entry of the purported judgment of September 1, 1964, and moves that by reason of the death of the said Jacob S. Floyd that he be dismissed as a party to said lawsuit; and this Defendant would further show that the Alice National Bank and Edith J. Floyd have filed a pleading in this cause recognizing said death and purporting to act as independent executors of the estate of Jacob S. Floyd, deceased, and as successor in interest to the said Jacob S. Floyd; and this Defendant would further show that such cause of action as was asserted by the said Jacob S. Floyd and which he might have had herein was personal to the said Jacob S. Floyd and that any rights that the said Jacob S. Floyd has as a member and director of the John G. and Marie Stella Kenedy Memorial Foundation ended with his death and did not pass to or vest in his estate; and that for all of such reasons the said Jacob S. Floyd and the said Edith J. Floyd and Alice National Bank as independent executors of the estate of Jacob S. Floyd, deceased, ought to be dismissed as parties to this lawsuit.

III.

ANSWER

Comes this Defendant and for answer to all pleadings on file herein by other parties would deny all and singular the allegations therein contained and demand strict proof thereof.

IV.

DEMAND FOR JURY

This Defendant requests that trial on the merits be held before a jury.

Homer Dean
P.O. Box 150
Alice, Texas 78332

Frances Tarlton Farenthold
c/o Wood, Boykin & Wolter
2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477

WOOD, BOYKIN & WOLTER
2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477

By: MARSHALL BOYKIN III
MARSHALL BOYKIN III

*Attorneys for Christopher
Gregory*

STATEMENT OF SERVICE

This will certify that service of the foregoing Defendant Christopher Gregory's First Amended Motion to Set Aside Interlocutory Judgment, Motion to Dismiss a Party and Answer was completed on the below named parties and/or attorneys of record in the above cause by depositing in the United States Mail on the 13th day of September, 1979, by Certified Mail, Return Receipt Requested, postage prepaid, a true and correct copy of the Motion addressed to said persons and attorneys at the following addresses:

Alice National Bank, Independent Executor for Estate of
Sarita K. East, Deceased
P. O. Drawer 1790
Alice, Texas 78332

The John G. and Marie Stella Kenedy Memorial
Foundation
P. O. Drawer 331
Alice, Texas 78332

Mr. Kenneth Oden, Jr.
P. O. Drawer 331
Alice, Texas 78332

Mr. B. R. Goldapp
Alice National Bank
P. O. Drawer 1790
Alice, Texas 78332

The Attorney General for the State of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711

Mr. Lee H. Lytton, Jr.
Sarita, Texas 78385

Mrs. Elena Kenedy
Sarita, Texas 78385

Mr. Denman Moody
P. O. Box 2558
Houston, Texas 77001

Most Reverend Thomas J. Drury
Bishop of the Diocese of Corpus Christi
620 Lipan Street
Corpus Christi, Texas 78401

Mr. Larry Watts
2325 University Blvd.
Houston, Texas 77005

MARSHALL BOYKIN III
MARSHALL BOYKIN III

APPENDIX G

No. 12,074

LEE H. LYTTON, JR.	}	IN THE DISTRICT COURT OF
VS.		
THE JOHN G. AND MARIE STELLA		JIM WELLS COUNTY, TEXAS
KENNEDY MEMORIAL FOUNDATION, <i>et al</i>		79TH JUDICIAL DISTRICT

ANSWER OF THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION, ET AL TO THE DEFENDANT
CHRISTOPHER GREGORY'S MOTION TO SET ASIDE
INTERLOCUTORY JUDGMENT AND MOTION TO DISMISS
A PARTY AND ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES The John G. and Marie Stella Kenedy Memorial Foundation, Elena S. Kenedy, Bishop Thomas J. Drury, Bishop of the Diocese of Corpus Christi, Lee H. Lytton, Jr., B. R. Goldapp, Kenneth Oden and Alice National Bank, Independent Executor of the Estate of Sarita K. East, Deceased, and make and file this, their Original Answer to the Motion of Christopher Gregory to Set Aside Interlocutory Judgment, and for such Answer, these parties respectfully show the Court the following:

I.

These parties deny each and every, all and singular, the allegations in said motion contained and say that the same are not true in whole or in part, and therefore demand strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, these parties pray the Court that the Defendant Christopher Gregory take nothing by his said motion and that said motion be in all things denied. These parties pray for such further relief, in law or in equity, general or special, to which they may show themselves justly entitled, together with all costs of suit.

PERKINS, ODEN, WARBURTON,
MCNEILL & ADAMI
P. O. Drawer 331
Alice, Texas 78332

By _____
Kenneth Oden

*Attorneys For The John G. and
Marie Stella Kenedy Memorial
Foundation, Elena S. Kenedy,
Bishop Thomas J. Drury,
Bishop of The Diocese of
Corpus Christi, Lee H. Lytton,
Jr., B. R. Goldapp, Kenneth
Oden and Alice National Bank,
Ind. Executor of Estate of
Sarita K. East, Dec'd.*

CERTIFICATE OF DELIVERY

I, KENNETH ODEN, of counsel for the above named parties in the foregoing cause do certify that a true and correct copy of the foregoing pleading was personally delivered to Mr. Marshall Boykin, Larry Watts and Francie A. Frederick, Assistant Attorney General, on this 21st day of September, 1979.

Kenneth Oden

APPENDIX H

No. 12,074

LEE H. LYTTON, JR.

vs.

The John G. and Marie Stella
KENEDY MEMORIAL FOUNDATION,
et. al.

IN THE DISTRICT COURT

of

JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

ANSWER OF THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION, ET AL TO THE MOTION OF
HONORABLE MARK WHITE, ATTORNEY GENERAL OF THE
STATE OF TEXAS, ET AL, FOR ENTRY OF FINAL JUDGMENT
AND TO DISMISS DEFENDANT GREGORY'S MOTION TO SET
ASIDE INTERLOCUTORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES The John G. and Marie Stella Kenedy Memorial Foundation, Elena S. Kenedy, Bishop Thomas J. Drury, Bishop of the Diocese of Corpus Christi, Lee H. Lytton, Jr., B. R. Goldapp, Kenneth Oden and Alice National Bank, Independent Executor of the Estate of Sarita K. East, Deceased, and make and file this, their Answer to the Motion of the Attorney General of the State of Texas, et al, for Entry of Final Judgment and to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment, and for such Answer, these parties respectfully show the Court the following:

I.

Honorable Mark White, Attorney General of the State of Texas, et al, have heretofore filed herein their Motion for Entry of Final Judgment and Motion to Dismiss Defendant Gregory's

Motion to Set Aside Interlocutory Judgment, moving the Court to enter Final Judgment in this cause and praying that the motion of Christopher Gregory aforesaid be dismissed.

II.

These parties join the Attorney General of the State of Texas, et al, in moving for entry of Final Judgment and in moving for a dismissal of said motion of Christopher Gregory.

WHEREFORE, PREMISES CONSIDERED, these parties pray the Court to enter Final Judgment in this cause and to dismiss the motion of Christopher Gregory to set aside said Interlocutory Judgment, and these parties further pray that they have such other and further relief, at law or in equity, general or special, to which they may show themselves justly entitled, together with all costs of suit.

PERKINS, ODEN, WARBURTON,
MCNEILL & ADAMI
P.O. Drawer 331
Alice, Texas 78332

By _____
KENNETH ODEN

*Attorneys for the John G. and
Marie Stella Kenedy Memorial
Foundation, Elena S. Kenedy,
Bishop of the Diocese of Corpus
Christi, Lee H. Lytton, Jr., B. R.
Goldapp, Kenneth Oden and
Alice National Bank, Ind.
Executor of the Estate of Sarita
K. East, deceased*

CERTIFICATE OF DELIVERY

I, KENNETH ODEN, of counsel for the above named parties in the foregoing cause do certify that a true and correct copy of the foregoing pleading was personally delivered to Mr. Marshall Boykin, Larry Watts and Francie A. Frederick, Assistant Attorney General, on this 21st day of September, 1979.

KENNETH ODEN

APPENDIX I

Entered November 28, 1979

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79th JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA
KENEDY FOUNDATION, *et al.*

FINAL JUDGMENT

BE IT REMEMBERED that on the 21st day of September, 1979 there came on to be heard the motion of the Honorable Mark White, Attorney General of the State of Texas, and others, for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, and the Court having heard all witnesses called by any party, and having read their written submissions and having fully considered the matter, it is the opinion of the Court that said motion should be granted; and

The temporary injunction referred to in Article VII of this Court's September 1, 1964 judgment as having theretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85 styled *Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased*, against *The John G. and Marie Stella Kenedy Memorial Foundation, et al.*,

having been dissolved and avoided with the dismissal with prejudice of that action on September 25, 1978, and all contests to the probate of the Will of Sarita K. East having been finally resolved and all other conditions to the entry of final judgment recited in *Gregory v. Lytton*, No. 14633 in the Court of Civil Appeals, San Antonio Division, having been fulfilled,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The motion for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, is granted in all respects.

2. The interlocutory injunctive provisions of Article V of the September 1, 1964 judgment are hereby vacated and dissolved and the said judgment is in all other respects reaffirmed and made final.

3. The John G. and Marie Stella Kenedy Memorial Foundation, the Alice National Bank of Alice, Texas, and the Estate of Sarita Kennedy East are hereby authorized and directed to take all steps necessary to execute, acknowledge, and deliver the instrument of assignment, in the form attached as Exhibit C to this Court's Judgment of September 1, 1964, as modified to take account of intervening events as shown by Exhibit A attached hereto, to the Sarita Kennedy East Foundation ("SKEF"), together with all royalty payments which have accrued thereon to SKEF and a proper accounting therefor.

4. This final judgment is without prejudice to the position of the respective parties concerning certain outstanding differences between them as to interest on such royalty payments and other matters concerning the proper interpretation of their settlement agreement.

5. All costs shall be taxed against the party incurring such costs for which execution shall issue if not timely paid.

RENDERED and SIGNED this 28th day of November,
1979.

s/ C.W. Laughlin
C.W. LAUGHLIN
District Judge

THE STATE OF TEXAS)
COUNTY OF JIM HOGG)

KNOW ALL MEN BY THESE PRESENTS: that The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Alice National Bank, a national banking association with its place of business in Alice, Texas, acting herein only in its capacity as executor of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars (\$10.00) cash and other good and valuable considerations in hand paid by the Sarita Kenedy East Foundation Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend K.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese,

dated September 1, 1947, of record in Vol. 28, Pages 319-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other materials produced and saved from the above described lands.

This sale and conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

Recorded in Deed or
Lease • Records of
Jim Hogg County at

GRANTEE	DATE OF INSTRUMENT	VOLUME	PAGE
E. B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L. E. Turcotte	September 1, 1947	28	534 et seq.
L. E. Turcotte	September 1, 1947	28	536 et seq.
L. E. Turcotte	February 28, 1955	39*	101 et seq.
L. E. Turcotte	June 22, 1956	41*	269 et seq.
L. E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1957	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars (\$25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above described lands which provides (i) for a royalty of less than one-eighth ($1/8$ th) of all oil produced, saved and sold, of less than one-eighth ($1/8$ th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth ($1/8$ th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess

of \$10,000 or \$2 per acre for the lands leased, whichever shall be the lesser amount, (iii) for delay rentals in excess of \$2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths ($7/8$ ths) of one-eighth ($1/8$ th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time

whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated 1st day of September, 1964, and the Final Judgment in said Cause entered in November 1979, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred

Thousand Dollars (\$14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

This instrument is subject to certain letter agreement dated February 20, 1964.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly author-

ized, and to be affixed with its corporate seal, this the
 day of 1979, as of the 1st day of
 April, 1962.

THE JOHN G. AND MARIE
 STELLA KENEDY MEMORIAL
 FOUNDATION

By: _____
 President
 GRANTOR

ATTEST:

 Secretary

ALICE NATIONAL BANK

By: _____
 President

ATTEST:

 Cashier

Executor of the Estate of
 Sarita K. East, Deceased,
 February 11, 1961

FILED

at 4:06 o'clock p.m.

NOV 28 1979

Manuel M. Perez
 Clerk District Court
 Jim Wells County, Tex.

BY _____ DEPUTY

APPENDIX J

No. 16,482

IN THE
Court of Civil Appeals
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
AT
SAN ANTONIO, TEXAS

CHRISTOPHER GREGORY,

Appellant

v.

MARK WHITE, ATTORNEY GENERAL, *et al*

Appellees

APPEAL FROM THE 79TH DISTRICT
COURT, JIM WELLS COUNTY, TEXAS

BRIEF OF APPELLANT, CHRISTOPHER GREGORY

HOMER DEAN

P.O. Box 150

Alice, Texas 78332

FRANCES FARENTHOLD

2020 Westcreek

Houston, Texas 77027

MARSHALL BOYKIN III

Wood, Boykin & Wolter

2000 Bank & Trust Tower

B & T 249

Corpus Christi, Texas 78477

NAMES OF ALL PARTIES

CHRISTOPHER GREGORY, also known as Brother Leo, is a Defendant in the Trial Court and the Appellant in this appeal.

LEE H. LYTTON, JR. is the Plaintiff in the Trial Court and an Appellee on this appeal.

JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION is a Defendant in the Trial Court and an Appellee in this appeal.

T. M. DOYLE is a Defendant in the Trial Court and an Appellee in this appeal.

JOHN J. MEEHAN is a Defendant in the Trial Court and an Appellee in this appeal.

J. PETER GRACE is a Defendant in the Trial Court and an Appellee in this appeal.

HONORABLE MARK WHITE, Attorney General of the State of Texas, is a Defendant in the Trial Court and an Appellee in this appeal.

BISHOP THOMAS J. DRURY is an Intervenor in the Trial Court and an Appellee in this appeal.

REVEREND PATRICK J. PEYTON is a Defendant in the Trial Court and an Appellee in this appeal.

JACOB S. FLOYD, now deceased, was a Defendant and Cross-Plaintiff in the Trial Court.

HENRIETTA K. ARMSTRONG, now deceased, was a Defendant in the Trial Court.

LAWRENCE E. WOOD, was a Defendant in the Trial Court.

ELENA S. KENEDY was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through her attorneys,

Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

B. R. GOLDAPP was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through his attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

KENNETH ODEN was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through his attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

ALICE NATIONAL BANK, Independent Executor of the Estate of Sarita K. East, Deceased was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through his attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

SUBJECT INDEX

Page

STATEMENT OF THE NATURE OF THE CASE	
POINTS OF ERROR	
POINT ONE	
POINT TWO	
POINT THREE	
POINT FOUR	
FACT STATEMENT	
BRIEF OF ARGUMENT (ALL POINTS OF ERROR)	
PRAYER FOR RELIEF	
CERTIFICATE OF SERVICE	

LIST OF AUTHORITIES

Cases	<u>Page</u>
<i>Armstrong v. Manzo</i> , 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965)	
<i>Bass v. Hoagland</i> , 172 F2d 205 (5th Cir. 1949) cert. denied, 338 US 816, 94 L Ed 494, 70 S Ct 57	
<i>Blair v. Paggi</i> , 238 SW 639 (Tex. Comm'n App. 1922, holding approved)	
<i>Burnaman v. Heaton</i> , 240 SW2d 288 (Tex. 1951)	
<i>Carter v. Carter</i> , 535 SW2d 215 (Tex. Civ. App. — Tyler, 1976, writ ref'd n.r.e.)	
<i>Farr v. McKenzie</i> , 477 SW2d 672 (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.)	
<i>Grannis v. Ordean</i> , 234 US 385, 58 L Ed 1363, 34 S Ct 779 (1914)	
<i>Gregory v. Lytton</i> , 422 SW2d 586 (Tex. Civ. App. — San Antonio, 1967, writ ref'd n.r.e.)	
<i>Hammond v. Ashe</i> , 103 Tex. 503, 131 SW 539 (1910)	
<i>Hensley v. Salinas</i> , 583, SW2d 617 (Tex. 1979)	
<i>In re LaMarre</i> , 494 F2d 753 (6th Cir. 1974)	
<i>Taggart v. Crews</i> , 543 SW2d 422 (Tex. Civ. App. — Waco, 1976, writ ref'd n.r.e.)	
<i>Thorne v. Moore</i> , 101 Tex. 205, 105 SW 985 (1907)	
<i>W. L. Moody & Company. Bankers v. Yarbrough</i> , 510 SW2d 396 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ ref'd n.r.e.)	
<i>Williams v. Hollingsworth</i> , 568 SW2d 130 (Tex. 1978)	
Constitutions	
U. S. Constitution, Amendments VII, V and XIV	
Texas Constitution, Art. I, § 15 and § 19	
Rules	
Texas Rules of Civil Procedure — Rule 11	

No. 16,482

IN THE
Court of Civil Appeals
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
AT
SAN ANTONIO, TEXAS

CHRISTOPHER GREGORY,

Appellant,

v.

MARK WHITE, ATTORNEY GENERAL, *et al*

Appellees.

APPEAL FROM THE 79TH DISTRICT
COURT, JIM WELLS COUNTY, TEXAS

BRIEF OF APPELLANT, CHRISTOPHER GREGORY

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a final judgment entered by the Judge of the 79th Judicial Court of Jim Wells County, Texas after hearing on a motion of the Attorney General, and others, for entry of final judgment and to dismiss this Appellant's motion to set aside an interlocutory judgment.

POINTS OF ERROR

POINT ONE

The Trial Court erred in sustaining the motion of the Attorney General and others and entering a final judgment in this cause without holding a trial on the merits. (TR 106-115)

POINT TWO

The Trial Court erred in rendering final the alleged agreement of the parties theretofore incorporated in an interlocutory judgment of September 1, 1964 without trial on the merits of the issues raised by Appellant's pleading in which Appellant made known to the Trial Court prior to entry of such final judgment Appellant's claim of no consent and continuing refusal to consent thereto. (TR 106-115)

POINT THREE

The Trial Court erred in dismissing, without a jury trial on the merits, the motion of Appellant, Christopher Gregory, to set aside the interlocutory judgment of September 1, 1964. (TR 106-115)

POINT FOUR

The Trial Court denied Appellant due process of law in entering final judgment against Appellant without trial on the issues raised by Appellant prior to entry of such final judgment. (TR 106-115)

FACT STATEMENT

There was never a trial on the merits of any issue in this lawsuit. (TR 121-125) The lawsuit was filed prior to the entry therein of an interlocutory judgment dated September 1, 1964. (TR 121-125) On September 1, 1964 there was signed and entered what purports to be a judgment entered upon a compromise and settlement agreement between the then parties to the lawsuit, which judgment recited that it was interlocutory. (TR 13-38) In April of the next year, the Plaintiff in this lawsuit filed his Second Amended Original Petition in which he reasserted his cause of action against the various Defendants and added allegation based upon issues raised by certain persons claiming the right to be intervenors in this cause. (TR 45-51)

On the very same day, April 30, 1965, the Defendant and Third Party Cross-Plaintiff, Jacob S. Floyd, filed his amended pleading setting forth allegations under which he claimed the right to serve as a member of The John G. and Marie Stella Kenedy Memorial Foundation. (TR 39-44) The other Defendants in this cause, with the exception of the Attorney General, had at various times filed answers, mostly in the nature of denials, putting in issue the basic question raised by Plaintiff's pleading, that is, who was entitled to serve as members and directors of The John G. and Maria Stella Kenedy Memorial Foundation. (SUPP. TR 3,4,5,6,7-13,14; TR 52 AD, 93-96) At no time has there been a trial on the merit of these issues. (TR 121-125)

On March 8, 1966 the Appellant herein, Christopher Gregory, filed a petition in the nature of bill of review which was docketed as Cause No. 13,850 in the 79th District Court of Jim Wells County, Texas naming as Defendants those persons then parties to Cause No. 12,074 in the 79th District Court (being the cause out of which this appeal is taken) as well as those persons claiming to be members of The John G. and Marie Stella Kenedy Memorial Foundation pursuant to the interlocutory judgment of September 1, 1964. (Ex. 8, SF Ex. Vol. 63-88) Appellant's petition in said cause (13,850) set forth Appellant's claims that the alleged agreements represented by the interlocutory judgment of September 1, 1964 were invalid as to him, and that he did not consent thereto. In that cause (No. 13,850) Mr. Lee H. Lytton, Jr. (the Plaintiff in Cause No. 12,074) The John G. and Marie Stella Kenedy Memorial Foundation (a Defendant in Cause No. 12,074) Waggoner Carr as Attorney General of the State of Texas (a Defendant in Cause No. 12,074) and others moved the Court to dismiss Christopher Gregory's petition in the nature of bill of review on the basis that the judgment complained of by Christopher Gregory, that is, the judgment of September 1, 1964, was and is an interlocutory order, temporary in nature and not a final judgment. (Ex. 11, SF Ex. Vol. 118-123) Bishop Drury joined in such motion. (Ex. 17, SF Ex. Vol. 141-143) Judge

C. W. Laughlin of the 79th District Court granted such motions and entered the Court's order dismissing Christopher Gregory's petition in the nature of a bill of review. (Ex. 18, SF Ex. Vol. 144-149) The Court of Civil Appeals for the Fourth Supreme Judicial District affirmed this dismissal with the holding that the judgment was not final, but interlocutory. (Ex. 19, SF Ex. Vol. 150-160) The Supreme Court refused application for writ of error with the notation n.r.e. *Gregory v. Lytton*, 422 SW2d 586 (Tex. Civ. App.—San Antonio, 1967, writ ref'd n.r.e.) On August 1, 1968 Christopher Gregory filed his motion in No. 12,074 to set aside the interlocutory judgment, (TR 52 A-D) to which Intervenor Bishop Drury, and others, responded. (TR 53-54, 102-103)

In 1979 a motion was made by Mr. Lytton and others to amend the interlocutory judgment of September 1, 1964 to remove therefrom any restraint which said judgment might impose upon implementing a settlement agreement made in connection with a will contest numbered Cause No. 101,209-D, in the 105th District court of Nueces County, Texas. (TR 55-82) An order amending and modifying the acknowledged interlocutory judgment of September 1, 1964 was entered "without prejudice to the position of and claims asserted by Christopher Gregory" (TR 83-84)

On the 24th day of July, 1979 the Honorable Mark White, Attorney General of the State of Texas, joined by Thomas M. Doyle, John J. Meehan and J. Peter Grace filed a motion in the 79th Judicial District Court asking the Court to implement what they claimed to be the final settlement evidenced by the interlocutory judgment of September 1, 1964, by making it the final judgment of the Court, and at the same time, setting aside Appellant's motion to set aside such interlocutory judgment and try the issue on the merits. (TR 85-91) This motion was set forth hearing, (TR 92) and prior to the hearing, several of the

other parties joined in the Attorney General's motion. (TR 104-105)

At the time such motion came on to be heard the Appellant had on file among the papers in the cause his First Amended Motion to Set Aside Interlocutory Judgment, Motion to Dismiss a Party and Answer in which he set out his claim that the agreement represented by the interlocutory judgement entered on the 1st day of September, 1964 was void and of no effect for several reasons including but not limited to, lack of authority, duress, failure of condition precedent, etc., and also because he no longer consented thereto. This pleading also contained a general denial of the allegations of pleadings of all other parties in the cause and a demand for a jury trial on the merits. (TR 93-96)

At the beginning of the hearing the Movant offered certain testimony in support of the motion to which the Appellant continually objected on the basis that the evidence offered was not material to the hearing on the motion but would only be material if the case were being tried on the merits, which it was not. (SF 4-5, 6-7, 10, 17-18, 32-33, 49, 51, 70-71)

BRIEF OF THE ARGUMENT

(ALL POINTS OF ERROR)

The position of the Appellant, Christopher Gregory, is rather simple. It is that the interlocutory judgment of September 1, 1964, which based upon an alleged agreement between all of the parties to this litigation cannot be made final except after a trial on the merits, if at all. In other words, Christopher Gregory is entitled to his day in court to determine whether the agreement contained in the interlocutory judgment of September 1, 1964, binds him, and, if not, whether he is a member of The John G. and Marie Stella Kenedy Memorial Foundation.

The movants in the motion heard before the Court on September 21, 1979, contended that certain attorneys and parties to this

cause did not know of dissatisfaction of or claim of non-binding consent of Christopher Gregory, (TR 85-91) which issue, even if of legal import, is not properly tried or considered on a motion such as that before the Court. It was clearly established that Mr. Oden, the lead attorney for the so-called "Texas Group" was aware not too long after September 1, 1964 that Christopher Gregory was not entirely happy with the economics of the settlement, or "even shortly before September 1," that Christopher Gregory was not satisfied with the judgment. (SF 58-59) Mr. Jewett and Mr. Moody, who at one time at least purported to represent Christopher Gregory, became aware in December of 1964 that Christopher Gregory did not agree with the September 1, 1964 judgment. (Jewett, SF 33; Moody, SF 49) Thereafter, as Mr. Oden so succinctly put it, Brother Leo "splintered off." (SF 60) Certainly, upon the filing by Christopher Gregory of his "petition in the nature of bill of review" in Cause No. 13,850, filed on March 8, 1966, Christopher Gregory's claim of non-consent to that agreement evidenced by that interlocutory judgment of September 1, 1964 was made known to all parties. (Ex's. 8, 9, SF Ex. Vol. 88-117) Christopher Gregory's petition in the nature of bill of review in No. 13,850 was dismissed on the grounds that the judgment of September 1, 1964 was not final but was wholly interlocutory and, thus, non-appealable, and such judgment was affirmed in *Gregory v. Lytton*, 422 SW2d 586 (Tex. Civ. App.-San Antonio, 1967, writ ref'd n.r.e.). Thus, the issue regarding the nature of the judgment entered on September 1, 1964 is no longer open to debate, but is *res judicata*. It was interlocutory, not final and not appealable.

After refusal by the Supreme Court to grant a writ, Christopher Gregory filed his pleadings in 12,074 indicating that he did not agree to the alleged agreement incorporated into the interlocutory judgment of September 1, 1964, and that he wanted a trial on the merits before a jury of the issues raised by the pleadings.

Where it is intended to enter a final judgment based upon an alleged agreement between the parties, and before entry of such final judgment one of the parties makes known to the Court his or her failure or refusal to then consent thereto, a Court may not enter a judgment based on such agreement. *Burnaman v. Heaton*, 240 SW2d 288 (Tex. 1951); *Williams v. Hollingsworth*, 568 SW2d 130 (Tex. 1978); *Hensley v. Salinas*, 583 SW2d 617 (Tex. 1979); *W. L. Moody & Company, Bankers v. Yarbrough*, 510 SW2d 396 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Farr v. McKinzie*, 477 SW2d 672, (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Carter v. Carter*, 535 SW2d 215 (Tex. Civ. App. — Tyler, 1976, writ ref'd n.r.e.).

The leading case is *Burnaman*, in which the Court had this to say:

The judgment was rendered on the agreement of the attorneys and was therefore a consent judgment. 25 Tex. Jur., p. 385, et seq; 49 C.J.S., Judgments, § 173, page 308, et seq. A valid consent judgment cannot be rendered by a court when consent of one of the parties thereto is wanting. It is not sufficient to support the judgment that a party's consent thereto may exist at the very moment the court undertakes to make the agreement the judgment of the court . . .

When a trial court has knowledge that one of the parties to a suit does not consent to a judgment, agreed to by his attorney, the trial court should refuse to give the agreement the sanction of the court so as to make it the judgment of the court. Any judgment rendered on the agreement under such circumstances will be set aside. *McMillan v. McMillan*, Tex. Civ. App., 72 S.W.2d 611, no writ history; *Preston v. Hill*, 50 Cal. 43. The same reasons which impel the setting aside of a consent judgment rendered by the court with knowledge that a party does not consent thereto will, in the interest of justice, also impel the setting aside of a consent judgment rendered when the court is in possession of information which is reasonably calculated to prompt the court to make further inquiry into the party's consent thereto, which in-

quiry, if reasonably pursued, would disclose the want of consent.

In such cases there is no question that the parties may elect to claim under the alleged agreement, that is, may assert same and elect to recover under the terms thereof; however, the non-consenting party is entitled to have a full trial on the merits before the court or jury of the issues relating to the validity of such agreement. *Burnaman v. Heaton*, 240 SW2d 288 (Tex. 1951); *W. L. Moody & Company, Bankers v. Yarbrough*, 510 SW2d 396 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Farr v. McKinzie*, 477 SW2d 672, (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Carter v. Carter*, 535 SW2d 215 (Tex. Civ. App. — Tyler, 1976, writ ref'd n.r.e.).

W. L. Moody & Company, Bankers v. Yarbrough, 510 SW2d 396 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ ref'd n.r.e.) is a fairly recent case in which the appellee Yarbrough filed a motion for entry of judgment based on a written letter agreement of settlement which motion was granted, after extensive hearing and testimony, by the trial court. In that case the appellant, Moody, had paid a jury fee and demanded a jury. The appellate court noted that at the time of the hearing the appellant, Moody, was claiming that no compromise settlement agreement had been effected and that the appellant, Moody, was entitled to a trial on the issues. The trial court made elaborate findings of fact; however, the appellate court reversed and remanded holding that: "The only basis for the judgment was the asserted compromise settlement agreement and the facts being in dispute with respect thereto, appellant was entitled to have such controversy reconciled upon proper pleadings by the jury."

In *Burnaman* the attorneys for the plaintiff and the defendant announced in open court their agreement of settlement which the appellate court acknowledged as an agreement made in compliance with Rule 11, Tex. R. Civ. P. However, the trial court was made aware, before entry of final judgment, that the plaintiff was

not agreeable to such settlement and claimed she did not authorize her attorney to make same. There was a hearing in which the attorney for the plaintiff testified to his authority. The Supreme Court in reversing the final judgment entered by the trial court made this important observation: "The fact that the agreement was made in open court and was entered of record would not be an absolute bar to her right to a trial of her suit. The judgment would."

The only distinction which the Appellees could make between this case and those cases hereinabove cited is that in this case there was an interlocutory judgment reflecting the alleged agreement between the parties. But this distinction can be no basis for establishing a rule in this case different from the rule announced in *Burnaman* and other cases. The finality of judgments cannot be threatened as such interlocutory judgment was never intended to be final. This is the reason it is not appellable. Opportunity for trial of the issues remains. In *Burnaman* the Texas Supreme Court took specific notice of the fact that an agreement made in open court and "entered of record" would not be a bar to trial of the issues in the lawsuit so long as a final judgment had not been entered.

There are undoubtedly two principles at work in these cases. One involves the finality of judgments. The other is the sanctity of the right to trial, and in certain cases, a trial before a jury. The latter principle, and its divisions, is and are guaranteed by the Constitution of the State of Texas and also by the Constitution of the United States of America. TEX. CONST. art. I, § 15 (Right of Trial By Jury) and § 19 (Right of Due Process); U.S. CONST. amend. VII (Right to Jury Trial), amend. V and amend. XIV (Due Process and Application of Due Process to State Action). The interpretive commentary under art. I, § 15, Vernon's Texas Constitution reads: "In civil cases for the trial of a cause, wherein a fact situation is raised by the pleadings, either party is entitled to a jury upon demand made to the court and the

payment of the jury fee. See *Hammond v. Ashe*, 103 Tex. 503, 131 SW 539 (1910); *Thorne v. Moore*, 101 Tex. 205, 105 SW 985 (1907); *Blair v. Paggi*, 238 SW 639 (Tex. Comm'n App. 1922, holding approved). If these conditions are met, the right is inviolate."

The requirement of due process is equally fundamental. The fundamental requisite is the opportunity to be heard. *Grannis v. Ordean*, 234 US 385, 58 L Ed 1363, 34 S Ct 779 (1914); and such hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965). The due process clause will protect litigants in their right to a full and fair hearing of the issues raised by them, and before a jury if such is their right. *Bass v. Hoagland*, 172 F2d 205, (5th Cir. 1949) cert. denied, 338 US 816, 94 L Ed 494, 70 S Ct 57.

The position of the Appellees in this case is that Christopher Gregory could not complain of the interlocutory judgment by a bill of review and thus secure trial of the issues raised by him (that he did not agree to such settlement except upon conditions which were not met, etc.) because such interlocutory judgment was not final, while at the same time saying that he cannot now assert and have a trial of such issues in the Trial Court because, as to him in such instance, the interlocutory judgment is final. The inconsistency of such positions, and their effect in denying Christopher Gregory his right to a trial of the issues, and, as to those which are questions of fact, before the jury if he so demands, is obvious. Sustaining such a position denies Christopher Gregory due process of law as the fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Grannis v. Ordean*, 234 US 385, 58 L Ed 1363, 34 S Ct 779 (1914), *Armstrong v. Manzo*, 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965). An interesting statement is made in *In re LaMarre*, 494 F2d 753 (5th Cir. 1974): "It is, of course, clear that on due process grounds, no judge can compel a

settlement prior to trial on terms which one or both parties find completely unacceptable." Of course, the trial court in this case did not compel the settlement represented by the interlocutory judgment in the sense of ordering same; however, in refusing Christopher Gregory a trial on the merits he denied him the same fundamental due process as was denied by the judge in that case.

The hearing in this case did clearly establish that there are disputed fact and law questions to be determined upon a full trial of the case. This can be illustrated by one clear example. Christopher Gregory testified that he never consented "unconditionally" to the original settlement (SF 73), but that instead he attached the signed settlement to a covering letter and sent it to the Holy See requiring that the Holy See release the settlement to the Court in order for it to be effective, and that it must have been intercepted, and that such conditions had not been met. This alone raises the question of whether or not there was a valid agreement since the effectiveness of a contract can be conditioned upon the happening of some future event, and if such future event does not come into existence, cannot be enforced. *Taggart v. Crews*, 543 SW2d 422 (Tex. Civ. App. — Waco, 1976, writ ref'd n.r.e.).

In summary, if it is held that the interlocutory judgment of September 1, 1964 based on the alleged agreement of the parties can be made final upon motion of one of the parties without trial of the issues raised by Christopher Gregory questioning the validity of such agreement and judgment, then Christopher Gregory has been very effectively denied his Constitutional right to his day in court on the issues, having been denied a right to attack the September 1, 1964 judgment by bill of review on the basis that it was not final, and now being denied the right to attack such judgment in the Trial Court on the basis that it was sufficiently final to deny Christopher Gregory the right to attack same in a full trial on the merits.

PRAYER FOR RELIEF

Appellant asks that this case be reversed and remanded for trial on the merits.

Respectfully submitted,

HOMER DEAN
P. O. Box 150
Alice, Texas 78332

FRANCES FARENTHOLD
2020 Westcreek
Houston, Texas 77027

MARSHALL BOYKIN III
Wood, Boykin & Wolter
2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477

MARSHALL BOYKIN III
MARSHALL BOYKIN III

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Brief of Appellant, Christopher Gregory has been forwarded by U.S. Mail, certified, return receipt requested, on this the 20th day of February, 1980, to:

MR. MARK WHITE,
Attorney General
Attn: Ms. Amie
Rodnick & Ms. Francie
A. Frederick
P. O. Box 12548 —
Capitol
Station
Austin, Texas 78711

MR. HARRY SCHULZ
P. O. Drawer 580
Three Rivers, Texas
78071

MR. ELMORE H.
BORCHERS
P. O. Box 725
Laredo, Texas 78040

MR. LARRY WATTS, P.C.
2325 University Blvd.
Houston, Texas 77005

REV. PATRICK PEYTON
Family Rosary, Inc.
773 Madison Avenue
Albany 8, New York

CAHILL, GORDON &
REINDEL
Attn: Mr. Denis
McInerny
& Mr. Kenneth
Fuchs
80 Pine Street
New York, New York
10004

MR. KENNETH ODEN
P. O. Drawer 331
Alice, Texas 78332

MARSHALL BOYKIN III
Marshall Boykin III

APPENDIX K

604 SW 2d 402

No. 16482.

Court of Civil Appeals

OF TEXAS, SAN ANTONIO.

JULY 25, 1980.

CHRISTOPHER GREGORY,

Appellant.

v.

MARK WHITE, ATTORNEY GENERAL OF THE
STATE OF TEXAS *et al.*

Appellees.

Party to settlement agreement appealed from an order of the 79th District Court, Jim Wells County, C. W. Laughlin, J., granting motion for entry of final judgment on settlement agreement. The Court of Civil Appeals, Murray, J., held that law firm retained to represent party to settlement agreement was authorized to seek judgment entered in accordance with settlement agreement, and party's failure to communicate to his attorneys, opposing parties' attorneys, trial judge, or any other parties, conditional nature of his consent before judgment was rendered, precluded such parties from denying this authority.

Affirmed.

Cadena, C. J., filed dissenting opinion.

1. Judgment (key) 73

A valid consent judgment cannot be rendered if, at time court undertakes to make the agreement the judgment of the court, trial judge has knowledge that one of parties to suit has withdrawn his consent.

2. Judgment (key) 72

An agreed judgment should not be rendered if trial judge possesses information that would reasonably prompt further inquiry, and this inquiry, if pursued, would disclose a lack of consent.

3. Judgment (key) 91

Once a settlement contract, agreed to by all of parties to suit, is incorporated in judgment of the court, a party is precluded from attacking validity of judgment in absence of allegation and proof of fraud or collusion.

4. Judgment (key) 91

Principles governing agreed judgments apply to all consent judgments whether interlocutory or final.

5. Attorney and Client (key) 101(1)

Law firm retained to represent party to settlement agreement was authorized to seek judgment entered in accordance with settlement agreement, and party's failure to communicate to his attorneys, opposing parties' attorneys, trial judge, or any of other parties, conditional nature of his consent before judgment was rendered, precluded such party from denying this authority.

Marshall Boykin, III, Wood, Boykin & Wolter, Corpus Christi, Homer Dean, Alice, Frances Farenthold, Houston, for appellant.

Mark White, Atty. Gen., Amie Rodnick, Asst. Atty. Gen., Austin, Dennis McInerney, Mathias E. Mone, Kenneth Fuchs, Cahill, Gordon & Reindel, New York City, Larry Watts, Houston, Kenneth Oden, Perkins, Oden, Warburton, McNeill & Adami, Alice, for appellees.

OPINION

MURRAY, Justice.

This is an appeal by Christopher Gregory, also known as Brother Leo, from a judgment entered by the 79th Judicial District Court of Jim Wells County, Texas. The judgment in this cause determined who was entitled to serve as members and directors of the John G. and Marie Stella Kenedy Memorial Foundation, which was established by Sarita K. East prior to her death on February 11, 1961. This appeal represents the latest installment in the East will litigation, which began in the early 1960's.¹ The present suit was instituted in 1961 and was settled by agreement in 1963. The settlement agreement, reduced to writing and signed by all of the parties, was incorporated in a judgment on September 1, 1964. The judgment was expressly made interlocutory pending the outcome of two suits in which claims against the East estate were being adjudicated. Approximately eighteen months after the interlocutory judgment was rendered the appellant filed a petition in the nature of a bill of review to set it aside. The trial court dismissed the petition reasoning that the order was not a final judgment and was therefore not properly the subject of a suit in the nature of a bill of review. On appeal this court affirmed the trial court's action dismissing the appellant's petition. See *Gregory v. Lytton*, 422 S.W.2d 586, 591 (Tex.Civ.App.-San Antonio 1967, writ ref'd n.r.e.).²

On July 24, 1979, the appellees filed a motion for the entry of final judgment arguing that the supreme court's decision in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), removed the

¹ As pointed out by the supreme court in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), there have been numerous appeals involving the East estate. See *id.* at 684 n. 1.

² The background of this case is fully set out in *Gregory v. Lytton*, and will not be repeated here. We will, of course, provide additional facts necessary for an understanding of the disposition of this appeal.

last obstacle to making the September 1, 1964, judgment final. Subsequently, on September 14, 1979, the appellant filed a first amended motion to set aside the interlocutory judgment contending that the settlement agreement upon which the judgment was based is void for the following reasons: lack of authority, duress, failure of condition precedent, and because he no longer consented to the agreement.³

After a hearing the trial court granted the appellees' motion for the entry of final judgment. It is from this judgment that the appellant has perfected an appeal.

By several points of error the appellant contends that the trial court erred in entering a final judgment because (1) he notified the court prior to the entry of final judgment that he had withdrawn his consent to the settlement agreement; and (2) his consent to the settlement agreement was conditional and the condition has not been met.

[1, 2] A valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement the judgment of the court, the trial judge has knowledge that one of the parties to the suit has withdrawn his consent. Moreover, an agreed judgment should not be entered if the trial judge possesses information that would reasonably prompt further inquiry, and this inquiry, if pursued, would disclose a lack of consent. See *Burnaman v. Heaton*, 150 Tex. 333, 339, 240 S.W.2d, 288, 291-92 (1951).

[3] Once a settlement contract, agreed to by all of the parties to the suit, is incorporated in a judgment of the court, however, a party is precluded from attacking the validity of the judgment in the absence of an allegation and proof of fraud or collusion. This rule is simply an application of the general principle that one cannot complain of that to which he has agreed. See *De Lee v.*

³ Appellant's original motion to set aside the interlocutory judgment was filed on August 1, 1968.

Allied Finance Co., 408 S.W.2d 245, 247 (Tex.Civ.App.-Dallas 1966, no writ). In the instant case the evidence conclusively establishes that the appellant signed the settlement agreement and that the judge had no reason to know of any dissatisfaction that the appellant might have had with the agreement at the time the interlocutory judgment was rendered.

[4] There is no justification either in law or logic for applying a different rule to agreed interlocutory judgments than to agreed final judgments. An agreed interlocutory judgment would be of little value if its terms could be avoided by the withdrawal of consent of one of the parties. Accordingly, we hold that the above-stated principles governing agreed judgments apply to all consent judgments whether interlocutory or final.

[5] In support of his assertion that he never consented unconditionally to the settlement agreement the appellant relies on his own testimony adduced at the hearing on the appellees' motion for entry of final judgment. In this regard he testified that he was told by his superior that if he did not sign the agreement he would be excommunicated from the Catholic Church. He subsequently consulted another superior who suggested that he sign the document and attach to it a cover letter to the Holy See in Rome, which would require the Holy See's written approval before the settlement agreement was released to the court.

The appellant argues that his lawyers were not authorized to effect the settlement agreement since he had conditioned his consent on the approval of the Holy See and the condition has not been met. We disagree.

In April of 1961 the Houston, Texas, law firm of Baker & Botts was retained to represent the appellant and others, including the John G. and Marie Stella Kenedy Memorial Foundation. Thereafter, in 1963 a settlement agreement was entered into by the parties. The appellant signed the agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a

year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.

The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communicate to his attorneys the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. See *Allsman v. Robinson*, 25 S.W.2d 237, 239 (Tex.Civ.App.—El Paso 1930, no writ).

For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court.

CADENA, Chief Justice, dissenting.

There can be no quarrel with the holding by the majority that a consent interlocutory judgment cannot be set aside if it was entered prior to the time that the consent of one of the parties was revoked. But appellant in this case complains of the fact that the trial court entered a final judgment without a hearing on the merits after he had made known to the court that he had withdrawn his consent to the agreement on which the agreed interlocutory judgment was based.

The authorities cited in the majority opinion hold that a valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement of the parties the judgment of the court the trial judge has knowledge that one of the parties to the agreement has withdrawn his consent or if, prior to rendition of the judgment, the trial court has knowledge of facts which

would reasonably prompt further inquiry and such inquiry would disclose the lack of continued consent. It is clear in this case that, at the time the final judgment was rendered, the trial court was fully aware of the fact that appellant had revoked his consent. While it is true that at the time the interlocutory order was rendered the trial court had no reason to suspect that appellant was dissatisfied with the agreement, this fact can justify no more than a holding that the interlocutory order was properly rendered.

Since appellant did not consent to the rendition of the final judgment, basing such judgment on the repudiated agreement was clearly error. *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (1951).

(KEY)

APPENDIX L

No.

IN THE
Supreme Court of The State of Texas

CHRISTOPHER GREGORY,

Petitioner.

v.

MARK WHITE, ATTORNEY GENERAL, *et al.*,

Respondents.

**PETITIONER'S APPLICATION
FOR WRIT OF ERROR**

WOOD, BOYKIN, & WOLTER
MARSHALL BOYKIN III
2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477
Attorneys for Petitioner

NAMES OF ALL PARTIES

Christopher Gregory, also known as Brother Leo, was a Defendant in the Trial Court, an Appellant in the Court of Civil Appeals and is Petitioner in this Application.

Lee H. Lytton, Jr. was the Plaintiff in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

The John G. and Marie Stella Kenedy Memorial Foundation was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

T. M. Doyle was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

John J. Meehan was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

J. Peter Grace was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

Honorable Mark White, Attorney General of the State of Texas, was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

Bishop Thomas J. Drury was an Intervenor in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

Reverend Patrick J. Peyton was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals and is a Respondent in this Application.

Jacob S. Floyd, now deceased, was a Defendant and Cross-Plaintiff in the Trial Court.

Henrietta K. Armstrong, now deceased, was a Defendant in the Trial Court.

Lawrence E. Wood, was a Defendant in the Trial Court.

Elena S. Kenedy was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through her attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

B. R. Goldapp was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through his attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

Kenneth Oden was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through his attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

Alice National Bank, Independent Executor of the Estate of *Sarita K. East*, Deceased was never properly named a party to this cause of action, but made an appearance in the hearing on the motion to enter final judgment by and through its attorneys, Perkins, Oden, Warburton, McNeill & Adami acting by Mr. Kenneth Oden.

SUBJECT INDEX

STATEMENT OF THE NATURE OF THE CASE	
STATEMENT OF JURISDICTION	
POINTS OF ERROR	
POINT ONE	
POINT TWO	
POINT THREE	
POINT FOUR	
POINT FIVE	
FACT STATEMENT	
BRIEF OF THE ARGUMENT	
(ALL POINTS OF ERROR)	
PRAYER FOR RELIEF	
CERTIFICATE OF SERVICE	

Page

LIST OF AUTHORITIES

Cases

<i>Armstrong v. Manzo</i> , 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965)	
<i>Bass v. Hoagland</i> , 172 F2d 205 (5th Cir. 1949) cert. denied, 338 US 816, 94 L Ed 494, 70 S Ct 57	
<i>Blair v. Paggi</i> , 238 SW 639 (Tex. Comm'n App. 1922, holding approved)	
<i>Burnaman v. Heaton</i> , 240 SW2d 288 (Tex. 1951)	
<i>Carter v. Carter</i> , 535 SW2d 215 (Tex. Civ. App.—Tyler, 1976, writ ref'd n.r.e.)	
<i>Farr v. McKinzie</i> , 477 SW2d 672 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.)	
<i>Grannis v. Ordean</i> , 234 US 385, 58 L Ed 1363, 34 S Ct 779 (1914)	
<i>Gregory v. Lytton</i> , 422 SW2d 586 (Tex. Civ. App.—San Antonio, 1967, writ ref'd n.r.e.)	
<i>Hammond v. Ashe</i> , 103 Tex. 503, 131 SW 539 (1910)	
<i>Hensley v. Salinas</i> , 583 SW2d 617 (Tex. 1979)	
<i>In re La Marre</i> , 494 F2d 753 (6th Cir. 1974)	
<i>Thorne v. Moore</i> , 101 Tex. 205, 105 SW 985 (1907)	
<i>W. L. Moody & Company, Bankers v Yarbrough</i> , 510 SW2d 396 (Tex. Civ. App.—Houston, [1st Dist.] 1974, writ ref'd n.r.e.)	
<i>Williams v. Hollingsworth</i> , 568 SW2d 130 (Tex. 1978)	

Page

Constitutions

U.S. Constitution, Amendments VII, V and XIV	
Texas Constitution, Art. I, § 15 and § 19	

Statutes

Revised Civil Statutes, Art. 1728, Subdivisions 1, 2 and 6	
---	--

Rules

Texas Rules of Civil Procedure — Rule 11	
--	--

No.

IN THE
Supreme Court
OF
THE STATE OF TEXAS

CHRISTOPHER GREGORY,

Petitioner,

VS.

MARK WHITE, ATTORNEY GENERAL, ET AL,

Respondents.

PETITIONER'S APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Christopher Gregory, Appellant in Cause No. 16,482 in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, and a Defendant in the District Court, respectfully submits this Application for Writ of Error to correct errors of law committed by the Court of Civil Appeals in affirming the action of the Trial Court in granting, after a hearing, the motion of Respondents for the entry of final judgment, and in entering such final judgment as requested by such Respondents, such Respondents being Mark White, Attorney General of the State of Texas, J. Peter Grace, John J. Meehan, T. M. Doyle, Reverend Patrick J. Peyton, Lee H. Lytton, Jr., and The John G. and Marie Stella Kenedy Memorial Foundation. Elena S. Kenedy, B. R. Goldapp, Kenneth Oden, and Alice National Bank, the latter appearing as Independent Executor of the Estate of Sarita K. East, deceased, have made appearances in the hearing held by the Trial Court although not named parties to the cause.

STATEMENT OF THE NATURE OF THE CASE

This is a suit in which the issue is who are the true members of and directors of a Texas charitable foundation. The position of Christopher Gregory is that he is entitled by appointment of the founder, Mrs. East, to be a member and director of the foundation. This suit was originally commenced by Lee H. Lytton, Jr. He sought a judgment declaring himself and Jacob S. Floyd, now deceased, true members and directors of The John G. and Marie Stella Kenedy Memorial Foundation in place of the Defendants Christopher Gregory, J. Peter Grace, John J. Meehan, T. M. Doyle, and Reverend Patrick J. Peyton. The Attorney General of the State of Texas was made a party since The John G. and Marie Stella Kenedy Memorial Foundation was a Texas charitable foundation. The suit never came to trial, but what purports to be a compromise and settlement agreement between the then parties to the lawsuit was incorporated in what purports to be an agreed interlocutory judgment dated September 1, 1964. In July of 1979 the Attorney General joined by Mr. Doyle, Mr. Meehan and Mr. Grace filed a motion asking the Court to make the interlocutory judgment of September 1, 1964 the final judgment of the Court. This motion was set for hearing, and subsequently joined in by other parties and persons appearing at the hearing, and after such hearing the Trial Court granted such motion and made the interlocutory judgment of September 1, 1964 the final judgment of the Court. Christopher Gregory appealed. The San Antonio Court of Civil Appeals, in a divided opinion, Chief Justice Cadena dissenting, affirmed.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this suit under Subdivisions 1, 2 and 6 of article 1728 of the Revised Civil Statutes.

In this case the Court of Civil Appeals, in the majority opinion, approved the entry of final judgment by the Trial Court based upon an alleged settlement agreement and without trial on the

merits although the Trial Court had knowledge prior to entry of such final judgment that Petitioner did not consent to the agreement and requested trial. Therefore, the Court of Civil Appeals holds differently from the prior decisions of the Supreme Court in *Burnaman v. Heaton*, 150 Tex. 333, 240 SW2d 288 (1951); *Williams v. Hollingsworth*, 568 SW2d 130 (Tex. 1978); and *Hensley v. Salinas*, 583 SW2d 617 (Tex. 1979); and from the decisions of the other Courts of Civil Appeals in *Farr v. McKinzie*, 477 SW2d 672 (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.), and *Carter v. Carter*, 535 SW2d 215 (Tex. Civ. App. — Tyler, 1976, writ ref'd n.r.e.).

POINTS OF ERROR

POINT ONE

The Court of Civil Appeals erred in affirming the action of the Trial Court in sustaining the motion of the Attorney General and others and entering final judgment in this cause without holding a trial on the merits. [Germane to Assignments of Error Five, Six and Seven; TR 106-115]

POINT TWO

The Court of Civil Appeals erred in holding that a settlement agreement incorporated in an interlocutory judgment may be made final without trial on the merits even though prior to rendition of such final judgment the Trial Judge had knowledge that one of the parties to such settlement agreement was asserting his lack of consent to such settlement agreement. [Germane to Assignments of Error One and Eight; TR 106-115]

POINT THREE

The Court of Civil Appeals erred in holding that Petitioner was not entitled to a jury trial of those issues raised by him prior to the

entry of final judgment. [Germane to Assignments of Error Two, Five, Six and Nine; TR 106-115]

POINT FOUR

The Court of Civil Appeals erred in failing to hold that the Trial Court denied Petitioner due process of law in entering final judgment against him without a trial on the issues raised by him. [Germane to Assignment of Error Ten; TR 106-115]

POINT FIVE

The Court of Civil Appeals erred in holding that once a consent agreement is incorporated in an interlocutory judgment it is to be treated the same as a consent agreement incorporated in a final judgment. [Germane to Assignments of Error Three and Four; TR 106-115]

FACT STATEMENT

There was never a trial on the merits of any issue in this lawsuit. (TR 121-125) The lawsuit was filed in April of 1961; and on September 1, 1964 there was signed and entered what purports to be a judgment entered upon a compromise and settlement agreement between the then parties to the lawsuit, which judgment recited that it was interlocutory. (TR 13-38) In April of 1965 the Plaintiff filed his Second Amended Original Petition in which he reasserted his cause of action against the various Defendants and added allegations based upon issues raised by certain persons claiming the right to be intervenors in this cause. (TR 45-51) On the very same day the Defendant and Third Party Cross-Plaintiff, Jacob S. Floyd, filed his amended pleading setting forth allegations under which he claimed the right to serve as a member of The John G. and Marie Stella Kenedy Memorial Foundation. (TR 39-44) The other Defendants in this cause, with the exception of the Attorney General, has

at various times filed answers, mostly in the nature of denials, putting in issue the basic question raised by Plaintiff's pleading, that is, who was entitled to serve as members and directors of The John G. and Marie Stella Kenedy Memorial Foundation. (SUPP. TR 3, 4, 5, 6, 7-13, 14; TR 52 A-D, 93-96) At no time has there been a trial on the merit of these issues. (TR 121-125)

On March 8, 1966 the Petitioner herein, Christopher Gregory, filed a petition in the nature of bill of review which was docketed as Cause No. 13,850 in the 79th District Court of Jim Wells County, Texas naming as Defendants those persons then parties to Cause No. 12,074, (the case out of which this Application arises) as well as those persons claiming to be members of The John G. and Marie Stella Kenedy Memorial Foundation pursuant to the interlocutory judgment of September 1, 1964. (Ex. 8, SF Ex. Vol. 63-88) Appellant's petition in said cause (13,850) set forth Appellant's claims that the alleged agreements represented by the interlocutory judgement of September 1, 1964 were invalid as to him, and that he did not consent thereto. In that cause (No. 13,850) Mr. Lee H. Lytton, Jr. (the Plaintiff in Cause No. 12,074) The John G. and Marie Stella Kenedy Memorial Foundation (a Defendant in Cause No. 12,074) the Attorney General of the State of Texas (a Defendant in Cause No. 12,074) and others moved the Court to dismiss Christopher Gregory's petition in the nature of bill of review on the ground that the judgment of September 1, 1964, was and is an interlocutory order, temporary in nature and not a final judgment. (Ex. 11, SF Ex. Vol. 118-123) Bishop Drury joined in such motion. (Ex. 17, SF Ex. Vol. 141-143) Judge C. W. Laughlin of the 79th District court granted such motion and entered the Court's order dismissing Christopher Gregory's petition in the nature of bill of review. (Ex. 18, SF Ex. Vol. 144-149) The Court of Civil Appeals for the Fourth Supreme Judicial District affirmed this dismissal with the holding that the judgment was not final, but interlocutory. (Ex. 19, SF Ex. Vol. 150-160) This Court refused application for writ of error with the notation n.r.e. *Gregory v. Lytton*, 422 SW2d 586 (Tex.

Civ. App. — San Antonio 1967, writ ref'd n.r.e.) Thereafter, on August 1, 1968 Christopher Gregory filed his motion in No. 12,074 to set aside the interlocutory judgment, (TR 52 A-D) to which Intervenor Bishop Drury, and others, responded. (TR 53-54, 102-103)

In 1979 a motion was made by Mr. Lytton and others to amend the interlocutory judgment of September 1, 1964 to remove therefrom any restraint which said judgment might impose upon implementing a settlement agreement made in connection with a will consent numbered Cause No. 101, 209-D, in the 105th District Court of Nueces County, Texas. (TR 55-82) An order amending and modifying the acknowledged interlocutory judgment of September 1, 1964 was entered "without prejudice to the position of and claims asserted by Christopher Gregory. . . ." (TR 83-84)

On the 24th day of July, 1979 the Attorney General of the State of Texas, joined by Thomas M. Doyle, John J. Meehan and J. Peter Grace filed a motion in the 79th Judicial District Court asking the Court to implement what they claimed to be the final settlement evidenced by the interlocutory judgment of September 1, 1964, by making it the final judgment of the Court, and at the same time asking the Court to set aside Petitioner's motion and answer which sought a setting aside of the interlocutory judgment and trial on the merits. (TR 85-91) This motion was set for hearing, (TR 92) and prior to the hearing, several of the other parties joined in the Attorney General's motion. (TR 104-105)

At the time such motion came on to be heard Petitioner had on file among the papers in the cause his First Amended Motion to Set Aside Interlocutory Judgment, Motion to Dismiss a Party and Answer in which he set out his claim that the agreement represented by the interlocutory judgment entered on the 1st day of September, 1964 was void and of no effect for several reasons including but not limited to, unauthorized delivery, lack of authority, duress and failure of condition precedent, and also be-

cause he no longer consented thereto. This pleading also contained a general denial of the allegations of pleadings of all other parties in the cause and a demand for a jury trial on the merits. (TR 93-96)

At the beginning of the hearing the Movant offered certain testimony in support of the motion to which the Petitioner continually objected on the basis that the evidence offered was not material to the hearing on the motion but would only be material if the case were being tried on the merits, which it was not. (SF 4-5, 6-7, 10, 17-18, 32-33, 49, 51, 70-71)

BRIEF OF THE ARGUMENT

(ALL POINTS OF ERROR)

The position of the Petitioner, Christopher Gregory, is that the interlocutory judgment of September 1, 1964, which is based upon an alleged agreement between all of the parties to this litigation, and entered without trial upon the merits, cannot be made final, if at all, except after a trial on the merits. In other words, Christopher Gregory is entitled to his day in court to determine whether the agreement contained in the interlocutory judgment of September 1, 1964, binds him, and, if not, whether he is a member of The John G. and Marie Stella Kenedy Memorial Foundation.

Christopher Gregory's petition in the nature of bill of review in No. 13,850 was dismissed by the Trial Court on the ground that the judgment of September 1, 1964 was not final but was wholly interlocutory and, thus, non-appealable. This judgment was affirmed in *Gregory v. Lytton*, 422 SW2d 586 (Tex. Civ. App.-San Antonio, 1967, writ ref'd n.r.e.). Thus, the issue regarding the nature of the judgment entered on September 1, 1964 is no longer open to debate, but is *res judicata*. It was interlocutory, not final and not appealable.

After refusal by the Supreme Court to grant a writ in that case, Christopher Gregory filed his pleadings in 12,074 indicating that he did not agree to the alleged agreement incorporated into the interlocutory judgment of September 1, 1964, and that he wanted a trial on the merits before a jury of the issues raised by the pleadings.

Where it is intended to enter a final judgment based upon an alleged agreement between the parties, and before entry of such final judgment one of the parties makes known to the Court his or her failure or refusal to then consent thereto, a Court may not enter a judgment based on such agreement. *Burnaman v. Heaton*, 240 SW2d 288 (Tex. 1951); *Williams v. Hollingsworth*, 568 SW2d 130 (Tex. 1978); *Hensley v. Salinas*, 583 SW2d 617 (Tex. 1979); *W. L. Moody & Company, Bankers v. Yarbrough*, 510 SW2d 396 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Farr v. McKinzie*, 477 SW2d 672, (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Carter v. Carter*, 535 SW2d 215 (Tex. Civ. App.-Tyler, 1976, writ ref'd n.r.e.).

The leading case is *Burnaman*, in which the Court had this to say:

The judgment was rendered on the agreement of the attorneys and was therefore a consent judgment. 25 Tex. Jur., p. 385, et seq; 49 C.J.S., Judgments, § 173, page 308, et seq. A valid consent judgment cannot be rendered by a court when consent of one of the parties thereto is wanting. It is not sufficient to support the judgment that a party's consent thereto may at one time have been given; consent must exist at the very moment the court undertakes to make the agreement the judgment of the court . . .

When a trial court has knowledge that one of the parties to a suit does not consent to a judgment, agreed to by his attorney, the trial court should refuse to give the agreement the sanction of the court so as to make it the judgment of the court. Any judgment rendered on the agreement under such circumstances will be set aside. *McMillan v. McMillan*, Tex. Civ. App., 72 S.W.2d 611, no writ history; *Preston v.*

Hill, 50 Cal. 43. The same reasons which impel the setting aside of a consent judgment rendered by the court with knowledge that a party does not consent thereto will, in the interest of justice, also impel the setting aside of a consent judgment rendered when the court is in possession of information which is reasonably calculated to prompt the court to make further inquiry into the party's consent thereto, which inquiry, if reasonably pursued, would disclose the want of consent.

In such cases there is no question that the parties may elect to claim under the alleged agreement, that is, may assert same and elect to recover under the terms thereof; however, the non-consenting party is entitled to have a full trial on the merits before the court or jury of the issues relating to the validity of such agreement. *Burnaman v. Heaton*, 240 SW2d 288 (Tex. 1951); *W. L. Moody & Company, Bankers v. Yarbrough*, 510 SW2d 396 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Farr v. McKinzie*, 477 SW2d 672 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Carter v. Carter*, 535 SW2d 215 (Tex. Civ. App.-Tyler, 1976, writ ref'd n.r.e.).

W. L. Moody & Company, Bankers v. Yarbrough, 510 SW2d 396 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.) is a fairly recent case in which the appellee Yarbrough filed a motion for entry of judgment based on a written letter agreement of settlement which motion was granted by the trial court after extensive hearing and testimony. The appellant, Moody, had paid a jury fee and demanded a jury. The appellate court noted that at the time of the hearing the appellant, Moody, was claiming that no compromise settlement agreement had been effected and that the appellant, Moody, was entitled to a trial on the issues. The trial court made elaborate findings of fact; however, the appellate court reversed and remanded holding that: "The only basis for the judgment was the asserted compromise settlement agreement and the facts being in dispute with respect thereto, appellant was

entitled to have such controversy reconciled upon proper pleadings by the jury."

In *Burnaman* the attorneys for the plaintiff and the defendant announced in open court their agreement of settlement which the appellate court acknowledged as an agreement made in compliance with Rule 11, Tex. R. Civ. P. However, the trial court was made aware, before entry of final judgment, that the plaintiff was not agreeable to such settlement and claimed she did not authorize attorney to make same. There was a hearing in which the attorney for the plaintiff testified to his authority. The Supreme Court in reversing the final judgment entered by the trial court made this important observation: "The fact that the agreement was made in open court and was entered of record would not be an absolute bar to her right to a trial of her suit. The judgment would."

The only distinction which the Respondents could make between this case and those cases hereinabove cited is that in this case there was an interlocutory judgment reflecting the alleged agreement between the parties. The majority of the Court of Civil Appeals in this case apparently did distinguish this case from *Burnaman* and the others holding that an interlocutory judgment based on alleged consent of the parties should be treated the same as a final judgment based on an alleged consent of the parties. Chief Justice Cadena dissented from the majority holding, being of the opinion that since Petitioner did not consent to the rendition of the final judgment, entering final judgment on the repudiated agreement without giving Petitioner a trial on the merits "was clearly error."

The fact that the alleged agreement for judgment was incorporated in an interlocutory judgment should not be a basis for establishing a rule in this case different from the rule announced in *Burnaman* and other cases. The finality of judgments cannot be threatened since such interlocutory judgment was never intended to be final. This is the reason it is not appealable.

Opportunity for trial of the issues remains. In *Burnaman* the Texas Supreme Court took specific notice of the fact that an agreement made in open court and "entered of record" would not be a bar to trial of the issues in the lawsuit so long as a final judgment had not been entered.

There are undoubtedly two principles at work in these cases. One involves the finality of judgments. The other is the sanctity of the right to trial, and in this case, a trial before a jury.

Trial of the merits before a jury is guaranteed by the Constitution of the State of Texas and also by the Constitution of the United States of America. TEX. CONST. art. I, §15 (Right of Trial By Jury) and §19 (Right of Due Process); U.S. CONST. amend. VII (Right to Jury Trial), amend. V and amend. XIV (Due Process and Application of Due Process to State Action). The interpretive commentary under art. I, §15, Vernon's Texas Constitution reads: "In civil cases for the trial of a cause wherein a fact situation is raised by the pleadings, either party is entitled to a jury upon demand made to the court and the payment of the jury fee. See *Hammond v. Ashe*, 103 Tex. 503, 131 SW 539 (1910); *Thorne v. Moore*, 101 Tex. 205, 105 SW 985 (1907); *Blair v. Paggi*, 238 SW 639 (Tex. Comm'n App. 1922, holding approved). If these conditions are met, the right is inviolate." *Burnaman* holds that even upon consent to judgment by the parties this right remains inviolate until entry of a final judgment.

The requirement of due process is equally fundamental. The fundamental requisite is the opportunity to be heard. *Grannis v. Ordean*, 234 US 385, 58 L Ed 1363, 34 S Ct 779 (1914); and such hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965). The due process clause will protect litigants in their right to a full and fair hearing of the issues raised by them, and before a jury if such is their right. *Bass v. Hoagland*, 172 F2d 205, (5th Cir. 1949) cert. denied, 338 US 816, 94 L Ed 494, 70 S Ct 57. *Burnaman* also protects a litigant in such a right.

The position of the Respondents in this case is that Christopher Gregory could not complain of the interlocutory judgment by a bill of review and thus secure trial of the issues raised by him (that he did not agree to such settlement except upon conditions which were not met, etc.) because such interlocutory judgment was not final, while at the same time savings that he cannot now assert and have a trial of such issues in the Trial Court because, as to him in such instance, the interlocutory judgment is final. The inconsistency of such positions, and their effect in denying Christopher Gregory his right to a trial of the issues, and, as to those which are questions of fact, before the jury if he so demands, is obvious. Sustaining such a position denies Christopher Gregory due process of law as the fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Grannis v. Ordean*, 234 US 385, 58 L Ed 1363, 34 S Ct 779 (1914), *Armstrong v. Manzo*, 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965). An interesting statement is made in *In re LaMarre*, 494 F2d 753 (6th Cir. 1974): "It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable." Of course, the trial court in this case did not compel the settlement represented by the interlocutory judgment in the sense of ordering same; however, in refusing Christopher Gregory a trial on the merits the Court denied him the same fundamental due process as was denied by the trial judgment in *LaMasrre*.

The majority opinion of the San Antonio Court of Civil Appeals states that Petitioner claimed error because his consent to the settlement agreement was conditional and the condition has not been met. This is not correct. None of the four points of error in the Appellant's brief claim such an error. Petitioner's brief in that court mentioned only that this was one example of an issue raised by Petitioner's pleading as to which Petitioner was entitled a full trial upon the merits.

Nevertheless, the San Antonio Court treated the issue as tried, without a jury, and notwithstanding the fact this was only a hearing on the Attorney General's motion. The San Antonio Court accepts the testimony offered by the movants as being uncontested because it was not fully controverted at such hearing. The Court then decides that attorneys representing the Petitioner were authorized to seek entry of the interlocutory judgment. One of the problems with such a decision is it is made without affording the Petitioner a full trial of such issues before the jury of such issue of authority.

There are other problems with accepting such rationale in support of the San Antonio Court's majority opinion. It not only begs the issue of the Petitioner's right to a full trial of that issue, it ignores the right of Petitioner to a trial of the several other issues raised by his pleadings. An authority based on some apparent type of estoppel is of no import if for any valid reason the agreement was not valid. In any event, Christopher Gregory is entitled at the very least to a trial on the merits before a jury of the issues raised by him in support of his appointment by Mrs. East as a member and director of her foundation.

PRAYER FOR RELIEF

Petitioner prays that this Application for Writ of Error be granted and that the Supreme Court reverse the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District sitting at San Antonio, Texas, and reverse the judgment of the District Court of Jim Wells County, Texas and remand this cause to said District Court for trial on the merits.

Respectfully submitted,

HOMER DEAN
P. O. Box 150
Alice, Texas 78332

FRANCES FARENTHOLD
3303 Main Street, Suite 332
Houston, Texas 77002

MARSHALL BOYKIN III
WOOD, BOYKIN & WOLTER
2000 Bank & Trust Tower
B & T 249
Corpus Christi, Texas 78477

MARSHALL BOYKIN III

MARSHALL BOYKIN III

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petitioner's Application for Writ of Error has been forwarded by U.S. mail, certified, return receipt requested, on this the 6th day of October, 1980, to:

MR. MARK WHITE,
ATTORNEY GENERAL
Attn: Ms. Amie Rodnick
P. O. Box 12548 — Capitol
Station
Austin, TX 78711

MR. LARRY WATTS, P.C.
2325 University Blvd.
Houston, TX 77005

CAHILL, GORDON & REINDEL
Attn: Mr. Denis McNerny &
Mr. Kenneth Fuchs
80 Pine Street
New York, N.Y. 10004

MR. KENNETH ODEN
P. O. Drawer 331
Alice, TX 78332

MR. HARRY SCHULZ
P. O. Drawer 580
Three Rivers, TX 78071

MR. ELMORE H. BORCHERS
P. O. Box 725
Laredo, TX 78040

REV. PATRICK PEYTON
Family Rosary, Inc.
773 Madison Avenue
Albany, New York 12208

MARSHALL BOYKIN III

MARSHALL BOYKIN III

APPENDIX M

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

Nov. 26, 1980

Dear Sir:

You are hereby notified that the application for Writ of Error in the case of CHRISTOPHER GREGORY v. MARK WHITE, ATTORNEY GENERAL et al, B-9856, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTOPHER GREGORY,
PETITIONER,

v.

MARK WHITE, ATTORNEY GENERAL
OF THE STATE OF TEXAS, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF TEXAS

Of Counsel:

MARSHALL BOYKIN, III
WOOD, BOYKIN & WOLTER
2000 Bank & Trust Tower
Corpus Christi, Texas 78477
(512) 888-9201

JAMES D. ST. CLAIR
BARBARA L. MOORE
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100
*Attorneys for the Petitioner
Christopher Gregory*

Questions Presented for Review

1. Whether ecclesiastical rules of the Roman Catholic Church govern the effectiveness of a power of attorney which is purportedly valid under those ecclesiastical rules but which is invalid under Texas civil law in a civil proceeding which does not involve an intra-church dispute?

2. Whether the state of Texas, acting through its Attorney General and the south Texas courts, can deny the rights of the Petitioner, a Trappist monk, to a trial on the merits and to a trial by jury on the basis of that power of attorney, where control of a charitable foundation worth over three hundred million dollars (\$300,000,000.00) hinges on that determination?

Parties to the Proceeding Below

CHRISTOPHER GREGORY, *Petitioner*: A Defendant in the Trial Court, an Appellant in the Court of Civil Appeals of Texas, and a Petitioner in the Supreme Court of Texas.

MARK WHITE, *Respondent*: The Attorney General of the State of Texas; was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

LEE H. LYTTON, JR., *Respondent*: The plaintiff in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, *Respondent*: A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

T. M. DOYLE, *Respondent*: A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

JOHN J. MEEHAN, *Respondent*: A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

J. PETER GRACE, *Respondent*: A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

BISHOP THOMAS J. DRURY, *Respondent*: An Intervenor in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

REVEREND PATRICK J. PEYTON, *Respondent*: A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

LAWRENCE E. WOOD: A Defendant in the Trial Court.

JACOB S. FLOYD: A Defendant and Cross-Plaintiff in the Trial Court, now deceased.

HENRIETTA K. ARMSTRONG: A Defendant in the Trial Court, now deceased.

ELENA S. KENEDY, B. R. GOLDAPP, KENNETH ODEN, AND THE ALICE NATIONAL BANK: Were never made parties to the proceedings below; however, appeared through their attorneys in connection with entry of the judgment herein claimed to be in error.

TABLE OF CONTENTS

	Page
Authorities	IV
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
I. Factual Background	3
II. Prior Proceedings	4
Reasons for Granting the Writ	8
I. The Action of the Courts Below Violated the Establishment Clause of the First Amendment to the United States Constitution	8
A. The Free Exercise Clause Does Not Re- quire Adherence to Ecclesiastical Rules or Practice in the Context of a Non-Intra- Church Dispute	10
B. The Establishment Clause Does Not Per- mit Reliance Upon Ecclesiastical Author- ity in the Context of a Non-Intra-Church Dispute	12
II. The Issue Involved Is of Major Importance and has Broad Implications Nationwide	15
III. The Actions of the Courts Below Violated the Due Process Clause of the Fourteenth Amend- ment to the United States Constitution	16
Conclusion	19
Appendix	A-1

TABLE OF AUTHORITIES

	Page
I. Constitutional Provisions.	
Amendment I to the United States Constitution	2, 9, 12
Amendment V to the United States Constitution	2, 15
Amendment VII to the United States Constitution	3, 15
Amendment XIV to the United States Constitution	2, 3, 12, 15, 16
II. Statutes.	
28 U.S.C. §1257(3)	2
III. Cases.	
<i>Abington School District v. Schempp</i> , 374 U.S. 203 (1963)	9, 13, 14
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965)	16, 17
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	16
<i>Burnaman v. Heaton</i> , 240 S.W. 2d 288 (Tex. 1951)	5, 17
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)	10
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	13
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947), <i>reh.</i> <i>den.</i> 330 U.S. 855	9, 13
<i>Fidelity Trust Co. v. Fowler</i> , 217 S.W. 953 (Tex. Civ. App. 1920)	14
<i>Gillette v. United States</i> , 401 U.S. 437 (1971), <i>reh. den.</i> 402 U.S. 934	9, 12
<i>Gulf States Paint Co. v. Kornblee Co.</i> , 390 S.W. 2d 356 (Tex. Civ. App. 1965)	14
<i>Joint Anti-Facist Refugee Committee v. McGrath</i> , 341 U.S. 123 (1951)	17
<i>In re Lamarre</i> , 494 F.2d 753 (6th Cir. 1974)	18
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	16, 17
<i>McCollum v. Board of Education</i> , 333 U.S. 203 (1948) . . .	14

	Page
<i>Presbyterian Church v. Hull Memorial Presbyterian Church</i> , 393 U.S. 440 (1969).....	11
<i>Serbian Eastern Orthodox Diocese v. Milivojevich</i> , 426 U.S. 696 (1976), <i>reh. den.</i> 429 U.S. 873.....	11
<i>Stevens v. Berger</i> , 428 F. Supp. 896 (E.D.N.Y. 1977)....	9
<i>United Methodist Council v. Superior Court</i> , 439 U.S. 1369 (1978).....	11, 12
<i>Watson v. Jones</i> , 80 U.S. 666 (13 Wallace 679) (1872)	9, 10, 11, 14

**In the
Supreme Court of the United States**

OCTOBER TERM, 1980

No. 80-

**CHRISTOPHER GREGORY,
PETITIONER,**

v.

**MARK WHITE, ATTORNEY GENERAL
OF THE STATE OF TEXAS, ET AL.,
RESPONDENTS.**

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF TEXAS**

The Petitioner Christopher Gregory respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas entered in this proceeding on November 26, 1980.

Opinions Below

The judgment of the Supreme Court of the State of Texas entered on November 26, 1980 refusing Petitioner's Application for Writ of Error was without opinion and is not reported. A copy of that judgment appears at page A-47 of the Appendix. The judgment of the Court of Civil Appeals of Texas, from which Petitioner applied to the Supreme Court of Texas for a Writ of Error, is reported at 604 S.W.2d 402 (Tex. Civ. App. 1980), a copy of which appears at page A-34 of the Appendix.

A related opinion of the Court of Appeals of Texas rendered in the action below on November 1, 1967 is reported at 422 S.W.2d 586 (Tex. Civ. App. 1967), a copy of which appears at page A-38 of the Appendix. That opinion was issued by the Court of Civil Appeals in affirming the dismissal of a Petition in the Nature of Bill of Review. The Supreme Court of Texas refused Petitioner's Application for a Writ of Error from the judgment of the Court of Civil Appeals on June 19, 1968, in an unreported decision without opinion.

An unrelated opinion of the Court of Civil Appeals of Texas rendered in the action below is reported at 371 Tex. Civ. App. 927 (1963). That opinion concerns dismissal of a petition for intervention, not herein relevant.

Jurisdiction

The judgment of the Supreme Court of the State of Texas sought to be reviewed was entered on November 26, 1980.¹ On December 11, 1980 Petitioner filed a Motion for Rehearing, which motion was denied on January 7, 1981. A copy of the judgment denying his Motion for Rehearing appears at page A-48 of the Appendix. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions Involved

1. United States Constitution, Amendment I, as incorporated to the states through Amendment XIV:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

2. United States Constitution, Amendment V, as incorporated to the states through Amendment XIV:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

¹ The time of entry of judgment is not indicated in court records.

3. United States Constitution, Amendment VII, as incorporated to the states through Amendment XIV:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . .

Statement of the Case

I. *Factual Background.*

The Petitioner Christopher Gregory ["Gregory"] is a member of the Order of Cistercians of the Strict Observance, also known as the Trappists¹ ["the Trappists"]. Sometime in 1947, Gregory became acquainted with Sarita Kenedy East ["East"]. During this time, Gregory was assisting in establishing Trappist monasteries in North and South America. Between 1946 and 1961, he helped establish seven such monasteries. East made a number of substantial contributions to this expansion program, and made several trips to the sites of the new monasteries in the United States, Argentina and Chile.

In 1960, East established The John G. and Marie Stella Kenedy Memorial Foundation ["the Foundation"] under the Texas Non-Profit Corporation Act. East signed the documents establishing the Foundation on or about January 22, 1960 at the office of her attorneys in Houston, Texas, who had drawn up the documents. At the same time, she executed a will, also prepared by her attorneys, in which she left the bulk of her estate to the Foundation. The purpose of the Foundation was to advance religious, charitable and educational goals.

At the time the Foundation was established, East named herself the sole member. On or about February 11, 1960 East appointed two additional members to the Foundation, Jacob

¹ Gregory is known as "Brother Leo" among the Trappists, and is occasionally referred to in that manner in pleadings filed in the action below.

Floyd ["Floyd"] and Lee H. Lytton ["Lytton"]. Sometime thereafter, Floyd and Lytton voluntarily resigned from the Foundation, at East's request, leaving East the sole member once again. On December 30, 1960 East appointed Gregory the second member of the Foundation.³

East died on February 11, 1961, leaving Gregory in control of the Foundation as its only member, with the power to appoint the Foundation's Board of Directors.

II. *Prior Proceedings.*

On April 19, 1961, Lytton filed a document entitled Plaintiff's Original Petition and Application for Injunction in the 79th District Court of Jim Wells County, Texas. *Lytton v. The John G. and Marie Stella Kenedy Memorial Foundation, et al.*, Cause No. 12,074 ["the Foundation Suit"]. Lytton named among the defendants the Foundation and Gregory. Lytton alleged that, because of undue influence exerted over East by Gregory and another defendant, East requested the resignations of Lytton and Floyd from membership in the Foundation in 1960, which resignations they voluntarily tendered. Lytton claimed that his and Floyd's resignations should be held null and void because of alleged undue influence exerted over East. He also claimed that, because of the same alleged undue influence, East's subsequent appointment of Gregory to membership in the Foundation should be held null and void, and that all subsequent actions by Gregory in his capacity as member of the Foundation should be held null and void. Lytton sought, in addition, injunctive relief.

³ In addition to the appointments described above, East from time to time attempted to make appointments to the membership and directorship of the Foundation through the execution of the First through the Sixth Codicils to her will. The validity of these appointments is doubtful. In any event, their validity is not at issue here.

A temporary restraining order was entered on August 23, 1961 without notice.⁴ The Foundation and Gregory, along with certain other defendants, thereafter filed a joint answer in which they denied the allegations of the Petition.⁵ The issues alleged by Lytton and denied by the defendants have never been tried.

On September 1, 1964, the trial court, after hearing, entered judgment in the action below ["the initial judgment"]. A-1. That initial judgment was based on an alleged compromise and settlement purportedly entered into by the parties to the action. Gregory had signed the alleged settlement agreement some months prior to the hearing, but consistently claimed throughout the proceedings below that his consent was expressly conditional upon the occurrence of events which had not occurred, and was obtained as the result of duress and undue influence. Gregory contended in addition that the alleged agreement had been altered after he signed his conditional consent. In any event, Gregory had expressly revoked his conditional consent both prior to the hearing and again afterward.⁶

Prior to the hearing, Gregory had been sent to a monastery outside the country. Gregory was not notified of nor was he present at the hearing at which the alleged settlement was purportedly confirmed. Gregory's resignation from the Foundation and several additional corporate actions were necessary at

⁴ The Restraining Order remained in effect through the time of entry of judgment on September 1, 1964 by agreement of the parties. The September 1 judgment then extended injunctive relief as a term of the judgment.

⁵ The pleadings filed with the trial court are voluminous, including several amendments to Lytton's petition. Those pleadings, however, are not relevant to the questions presented here.

⁶ These revocations by Gregory and by his then-attorney appear at pages A-50 through A-52 of the Appendix. Revocation of consent to a settlement is effective under Texas law. *Burnaman v. Heaton*, 240 S.W. 2d 288 (Tex. 1951).

the hearing to effectuate the alleged settlement. A purported resignation⁷ was tendered at the hearing by Robert Jewett ["Jewett"], an attorney who claimed to hold a power of attorney from Gregory. The power of attorney was not, in fact, from Gregory. It consisted of two telegrams sent to Jewett by Thomas Keating ["Keating"], Abbot of St. Joseph's Abbey in Spencer, Massachusetts. A-48. The telegrams recited that they were given by Keating "as the Superior of Christopher Gregory (Brother Leo)." On the basis of those telegrams alone, the trial judge accepted the purported power of attorney and Gregory's resignation, and entered judgment.

Gregory was not notified of entry of the initial judgment. On March 8, 1966, soon after Gregory learned of the entry of that initial judgment, he brought a Petition in the Nature of Bill of Review seeking review of the initial judgment. *Gregory v. Lytton, et al.*, Cause No. 13,850, 79th District Court of Jim Wells County ["the Bill of Review"]. Gregory alleged that his purported resignation from the Foundation, tendered by Jewett, was invalid; that his signature on the alleged settlement agreement was obtained as a result of duress and undue influence; and that his consent to the settlement agreement was, in any event, explicitly conditioned upon the occurrence of events which had not occurred. Gregory also claimed that the purported settlement agreement had been altered after his signature was affixed thereto.

The defendants in the Bill of Review (Cause No. 13,850) filed motions to dismiss Gregory's petition, on the grounds that the initial judgment entered in the Foundation Suit (Cause No. 12,074) on September 1, 1964 was interlocutory and therefore not subject to review. On May 8, 1967 the Court granted the motions to dismiss. The Court held that the judgment was interlocutory in its entirety and would not be final until the

⁷ A previous resignation had been expressly revoked prior to the September 1, 1964 hearing. Notice of that revocation was filed with the trial court by Gregory's then-attorney in September, 1963.

resolution of the contest of the probate of East's will.^a Resolution of that lawsuit would determine whether East's estate (of over \$300,000,000.00) would, in fact, flow into the Foundation.

Gregory appealed from the dismissal of his petition. The Court of Civil Appeals for the Fourth Judicial District of Texas at San Antonio affirmed the decision of the Trial Court on November 1, 1967. *Gregory v. Lytton, et al.*, 422 S.W.2d 586 (Tex. Civ. App. 1967). A-38. Gregory thereafter filed an Application for a Writ of Error in the Supreme Court of Texas, which application was denied without opinion on June 19, 1968. Gregory's Motion for Rehearing was also denied on July 24, 1968.

Gregory subsequently filed, on August 1, 1968 in the Foundation Suit (Cause No. 12,074), a document entitled Motion to Set Aside Interlocutory Judgment, Motion to Dismiss a Party and Answer. The lawsuit was then inactive for a period of years, pending outcome of the will contest upon which the initial judgment had been found to be interlocutory.

After conclusion of the will contest, Mark White ["White"], the Attorney General of the State of Texas, who was made a party below by statute, filed a Motion for the Entry of Final Judgment. In his motion, White stated that the initial interlocutory judgment entered on September 1, 1964 had dismissed the action with prejudice as against Gregory, and that the initial judgment should be made final without trial. Gregory thereafter filed an amended motion to set aside the initial judgment, in which he again indicated his lack of consent with the purported settlement agreement. He formally demanded a trial by jury.

On September 21, 1979, the trial court heard argument on White's motion for entry of final judgment. Counsel for

^a *Trevino, et al. v. Turcotte, et al.*, Cause No. 101,209-D, in the District Court of Neuces County, Texas, 105th Judicial District. The subsequent dismissal of that lawsuit is reported at 564 S.W.2d 682 (Tex. Civ. App. 1978).

Gregory appeared at that hearing, and raised the issue of Keating's lack of authority under civil law to grant a power of attorney on behalf of Gregory. He also raised the issues of right to trial and right to trial by jury.

On November 28, 1979, the Court granted White's motion and entered final judgment. A-24. The final judgment incorporated all the substantive provisions of the initial interlocutory judgment.

Gregory appealed from the final judgment to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio, raising Constitutional grounds of right to trial by jury and due process. On July 25, 1980 the Court of Civil Appeals affirmed the final judgment of the trial court. *Gregory v. White, et al.*, 604 S.W.2d 402 (Tex. Civ. App. 1980). A-34. Gregory moved for a rehearing, which motion was denied on September 10, 1980.

On October 15, 1980, Gregory filed an Application for Writ of Error in the Supreme Court of the State of Texas. He again raised Constitutional grounds of right to trial by jury and due process. On November 26, 1980 the Supreme Court of Texas refused his application. A-47. Gregory moved for a rehearing, which motion was denied on January 7, 1981. A-48.

Reasons for Granting the Writ

I. THE ACTION OF THE COURTS BELOW VIOLATED THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

On September 1, 1964, the judge in the trial court below accepted a written power of attorney as binding on Gregory, and entered judgment pursuant to that power of attorney. The power of attorney was not, however, executed by Gregory. It was given by Keating explicitly in his capacity as Gregory's religious "superior". A-48. There was no evidence before the

judge of any grant of authority from Gregory to Keating or from Gregory to Jewett.⁹ The Court's acceptance of that power of attorney, which was necessarily based solely on Keating's asserted ecclesiastical right to act on behalf of Gregory, violated the Establishment Clause of the First Amendment.

Two provisions of the First Amendment relate to the guarantees of religious freedom: The Establishment Clause and the Free Exercise Clause. There is, of course, overlap between the provisions, but their main thrusts are somewhat different. The Establishment Clause, on one hand, forbids the government from taking any step toward the establishment of religion. Proscribed actions include compelling, sanctioning or aiding religion over non-religion, or one religion over any other religion, *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), *reh. den.* 330 U.S. 855, thereby according civil effect to a religious or ecclesiastical principle. The Free Exercise Clause, on the other hand, forbids the government from interfering with or involving itself in the right of the individual to exercise religious freedom. That freedom includes one's right to his religious beliefs, *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977), and the right of a religious body to function without governmental involvement. *Watson v. Jones*, 80 U.S. 666, 679 (13 Wallace 679) (1872). The relationship between the two clauses can best be described as requiring complete and absolute neutrality by government in all matters pertaining to religion. *Gillette v. U.S.*, 401 U.S. 437, 449 (1971), *reh. den.* 402 U.S. 934; *Abington School District v. Schempp*, 374 U.S. 203, 226 (1963); *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947), *reh. den.* 330 U.S. 855.

⁹ Jewett claimed, at the hearing on White's Motion for Entry of Final Judgment on September 21, 1979, that he had received "corroboration" of Keating's authority to act on Gregory's behalf after the 1964 hearing at which the initial judgment was entered. Even if that were true (which Gregory denies), it would be irrelevant to the propriety of the Court's acceptance of the purported power of attorney at the 1964 hearing.

Lawsuits like this one which involve the interplay between ecclesiastical law and civil law can cast the two provisions in a contradictory light. Present in such cases are the possibility of governmental compulsion to adhere to a religious belief, in violation of the Establishment Clause; the possibility of governmental sanctioning of a certain religious belief, also in violation of the Establishment Clause; as well as the possibility of governmental interference with ecclesiastical rules and hierarchy, in violation of the Free Exercise Clause. One could view this case either as an example of the court sanctioning a religious superior's asserted ecclesiastical right to control the conscience of his religious subjects, or, instead, as an example of the court properly deferring to the ecclesiastical rules and practice controlling the relationship between a Trappist monk and his religious superior.

Gregory submits that the former perspective is the proper one. As set forth below, this is not a case where the government is required by the Free Exercise Clause to accept Keating's bald assertion that he has the right to sign away Gregory's constitutional rights to trial and trial by jury solely because Gregory is a Trappist monk. "Nothing [this Court has] said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

A. The Free Exercise Clause Does Not Require Adherence to Ecclesiastical Rules or Practice in the Context of a Non-Intra-Church Dispute.

In a long line of cases beginning with *Watson v. Jones*, 80 U.S. 666 (13 Wallace 679) (1872), this Court has considered the relationship between ecclesiastical law and civil law in civil courts. In *Watson v. Jones*, the Court considered the deference which must be given the decision of an ecclesiastical tribunal by a court hearing what is essentially an ecclesiastical dispute. The Court held:

[W]henever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Watson v. Jones, 80 U.S. 666, 676 (13 Wallace 679) (1872).

This Court has recently reaffirmed the principles enunciated in *Watson v. Jones*, and has expanded upon those principles. In *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the Court held that a civil court is powerless to determine whether there has been a departure from doctrine by an ecclesiastical tribunal. The case of *Serbian Eastern Orthodox Diocese v. Milivojevoch*, 426 U.S. 696 (1976), *reh. den.* 429 U.S. 873, presented a similar question in the context of a dispute over defrockment of a priest which would determine control of church property. The Court held:

When this choice [of an ecclesiastical tribunal] is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian Eastern Orthodox Diocese v. Milivojevoch, 426 U.S. 696, 724-25 (1976), *reh. den.* 429 U.S. 873.

This Court considered another aspect of the issue in *United Methodist Council v. Superior Court*, 439 U.S. 1369 (1978), a case which, unlike those discussed above, did not involve an intra-church dispute. It involved instead class action claims against the United Methodist Council and five other defendants for breach of contract, fraud and violations of state securities laws arising out of the financial collapse of a group of retirement homes. The United Methodist Council moved to quash service of process on the grounds that the Superior Court

violated the First and Fourteenth Amendments in refusing to accept its characterization of its position in the hierarchy of the United Methodist Church, which characterization would have excused the Council from the lawsuit. This Court rejected the argument that the lower court was bound by the church's interpretation of its structure and hierarchy.

There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes. . . . But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. [citations omitted].

United Methodist Council v. Superior Court, 439 U.S. 1369, 1372-73 (1978).

Thus the principle of *Watson v. Jones* and its progeny—that a civil court is bound by the decision of an ecclesiastical tribunal on an ecclesiastical matter—is not applicable in an action which is not an intra-church dispute.

The conclusion that the First Amendment does not *require* adherence to ecclesiastical principles in this context does not, however, address the question whether, conversely, the First Amendment *permits* such adherence. This Court has paved the way for consideration of this issue, but has stopped short of deciding it. Gregory submits that it is now appropriate to decide the question.

B. *The Establishment Clause Does Not Permit Reliance Upon Ecclesiastical Authority in the Context of a Non-Intra-Church Dispute.*

The central purpose of the Establishment Clause is to ensure complete and absolute government neutrality in matters of religion. *Gillette v. United States*, 401 U.S. 437, 449 (1971),

reh. den. 402 U.S. 934. It forbids subtle departures from neutrality as well as obvious abuses. *Id.*

The way in which this Court has mandated that neutrality be ensured is by the complete separation of church and state.

[T]he object [of the First Amendment] was broader than separation of church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Abington School District v. Schempp, 374 U.S. 203, 217 (1963); *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947), *reh. den.* 330 U.S. 855.

The Establishment Clause and the companion doctrine of separation of church and state were aimed at eliminating governmental persecution and inequality under the law based on religious belief. The historical justification for these doctrines was recounted by this Court in *Everson v. Board of Education*, 330 U.S. 1, 8-11 (1947), *reh. den.* 330 U.S. 855. The protection of citizens from governmental persecution because of religious belief is a cornerstone of the principles of individual liberty.

[T]he first and immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

Engel v. Vitale, 370 U.S. 421, 431 (1962). When government allies itself with one form of religion, the inevitable result is that it incurs "the hatred, disrespect and even contempt of those who hold contrary beliefs." *Id.*

The separation of church and state has the dual effects of protecting government from the dangers of religious involvement and, conversely, the effect of protecting religion from the dangers of government involvement.

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority.

Watson v. Jones, 80 U.S. 666, 676 (13 Wallace 679) (1872).

The trial judge below departed from "complete government neutrality" in accepting the power of attorney given by Keating. The power of attorney was necessarily premised on ecclesiastical authority, for there was no evidence before the court of civil authority or of agency. It is clear that a court could not accept a power of attorney gratuitously offered by a third party purportedly on behalf of a litigant, absent the asserted ecclesiastical authority. See, e.g., *Gulf States Paint Co. v. Kornblee Co.*, 390 S.W.2d 356 (Tex. Civ. App. 1965); *Fidelity Trust Co. v. Fowler*, 217 S.W. 953 (Tex. Civ. App. 1920). By placing official reliance on that power of attorney, the court sanctioned the ecclesiastical right of Keating to give it.

It is no justification to argue that the court did not favor one religion over another, and therefore did not exceed the bounds of propriety set by the Establishment Clause. "[S]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *McCullum v. Board of Education*, 333 U.S. 203, 227 (1948). The Establishment Clause forbids placing official support of government "behind the tenets of one or of all orthodoxies." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

By accepting Keating's claim of ecclesiastical authority, the court placed its imprimatur on the tenets of the Roman Catholic Church. This sanctioning of ecclesiastical practice is an egregious violation of the First Amendment.

II. THE ISSUE INVOLVED IS OF MAJOR IMPORTANCE AND HAS BROAD IMPLICATIONS NATIONWIDE.

The issue presented in this Petition—whether a court may rely on ecclesiastical rules and practice to bind a litigant in a non-intra-church dispute—is not limited to the facts of this case. It is not simply a question whether Gregory could be bound by the actions of his Abbot, but whether any litigant who happens to be a member or follower of a given religion can be bound by the tenets of that religion in a court of law. Determination of this question would be of importance to all litigants of all religions, particularly those whose personal interests come into conflict with the interests of their church hierarchies.

This issue is of great importance for the additional reason of its impact upon other constitutional guarantees of the litigants involved. In this case, for instance, the upshot of Gregory's being bound by Keating's power of attorney was denial of his rights to trial and to trial by jury, guaranteed by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution. See section III, *infra*. Despite Gregory's repeated protestations that he did not consent to the purported settlement agreement, he was denied a trial on the issue of the agreement's validity because of the court's reliance on Keating's power of attorney. One can readily see how such reliance on ecclesiastical authority could, in other fact situations, have an impact upon a litigant's rights under other constitutional provisions, statutes or regulations.

The right to be free from governmental compulsion to adhere to a given religious belief or rule is fundamental to individual liberty. This is true even where the individual, in the ordinary course of events, is a believer or follower of that religion. The fact that an individual has agreed to abide by the rules of his religion for purposes of protecting the autonomy of that religion and furthering its goals cannot imply that he has

also given up his right to act independently of his religion in courts of law. Resolution of this issue is especially important at a time when church-state relations are becoming increasingly complex. The determination now of the issue this case presents would likely have broad application and impact in the future.

III. THE ACTIONS OF THE COURTS BELOW VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

One simple fact is especially noticeable in the action below: Gregory was never given a trial on the merits by the south Texas courts on any of the issues he attempted to raise below. The glaring omission of any trial on the merits cannot be reconciled with the mandates of the Due Process Clause of the Fourteenth Amendment.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

Boddie v. Connecticut, 401 U.S. 371, 374 (1971). Central to the operation of the system through which citizens may settle their disputes is the concept of due process. *Id.*, at 375. The fundamental element of due process is the opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 554 (1965).

The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). In order for the opportunity to be heard to satisfy the requirements of due process, that opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 554 (1965).

At no time was Gregory given a meaningful opportunity to be heard in the Texas courts on even his claim that Keating lacked the authority to give a power of attorney on his behalf, *see* section I, *supra*, not to mention his defenses to the allegations of undue influence. The result of the denial of the opportunity to be heard was that Gregory was bound by actions carried out pursuant to Keating's alleged power of attorney and was thereby excluded from membership in the Foundation and denied the right to direct the use of the funds of the Foundation.

Gregory was not given the opportunity to be heard at any meaningful time with respect to his consent or lack thereof with the alleged settlement agreement prior to the entry of the initial judgment on September 1, 1964.¹⁰ Gregory has had no hearing whatsoever on his claims that his purported consent to the settlement was conditional, that it was the result of duress and undue influence, or that the settlement agreement was altered after he last saw it. And, in 1979, Gregory was again denied the right to a trial on the issue of his consent at that time to the settlement, prior to the final judgment.

¹⁰ There was limited testimony at the September 21, 1979 hearing on the motion for final judgment regarding Gregory's alleged consent to the settlement prior to the entry of the initial interlocutory judgment, a full fifteen years earlier. The issue, however, was whether Gregory's alleged consent was effective at the time of entry of final judgment. Gregory was not afforded a trial on that issue, to which he was entitled. *See Burnaman v. Heaton*, 240 S.W. 2d 288 (Tex. 1951).

Looking one layer deeper into the issues which have never been heard, Gregory has never been afforded an opportunity to be heard on the underlying claim that he exercised undue influence over East. Moreover, Gregory has not simply been denied the right to hearing; he has also been denied the right to a trial by jury, to which he was entitled.

Gregory, a Trappist monk, as a matter of conscience seeks among other things to be afforded the opportunity to fulfill the responsibilities imposed upon him by the founder when she appointed him to be the sole surviving member of her Foundation. He has been frustrated in his efforts to carry out her charitable goals by the imposition by the civil courts of south Texas of purported ecclesiastical rules and conventions rather than principles of governing civil law. In effect, the south Texas courts enforced an alleged settlement agreement to which Gregory never unconditionally consented, not once but twice, without trial on the underlying questions of fact. Indeed, the parties and the trial court were well aware that Gregory explicitly did *not* consent to the agreement before the entry of final judgment. "It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable." *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974). This court should not permit this blatant affront to the Constitution to stand.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Texas.

Respectfully submitted,

JAMES D. ST. CLAIR

BARBARA L. MOORE

HALE AND DORR

60 State Street

Boston, Massachusetts 02109

(617) 742-9100

Attorneys for the Petitioner

Christopher Gregory

Of Counsel:

MARSHALL BOYKIN, III

WOOD, BOYKIN & WOLTER

2000 Bank & Trust Tower

Corpus Christi, Texas 78477

(512) 888-9201

Dated:

APPENDIX

Entered September 1, 1964

**IN THE DISTRICT COURT OF JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT**

No. 12,074

LEE H. LYTTON, JR.

v.

**THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION, ET AL**

JUDGMENT

BE IT REMEMBERED that on this 1st day of September, 1964, there came on to be heard the above entitled and numbered cause, wherein Lee H. Lytton, Jr. is plaintiff and cross-defendant, Jacob S. Floyd is defendant and cross-plaintiff, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, is intervenor, and The John G. and Marie Stella Kenedy Memorial Foundation, T. M. Doyle, John J. Meehan, J. Peter Grace, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, Lawrence E. Wood and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., are defendants and cross-defendants, and wherein the Attorney General of the State of Texas is joined as a party, having been served with process and citation in accordance with the terms of Article 4412a, Section 3, Vernon's Civil Statutes of Texas, these being all of the parties of record in this suit, and it appearing to the court that T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong and Lawrence E. Wood have this day, in open court, resigned from, and renounced their rights to, their respective offices as members, directors and officers of The John G. and Marie Stella Kenedy memorial Foundation, and that the

plaintiff and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, by and through their attorneys or record, announced in open court that they, the said plaintiffs and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, no longer wished to prosecute this suit as against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood and requested that the court dismiss this suit, with prejudice, as against said parties;

It is accordingly ORDERED, ADJUDGED and DECREED by the court that this suit be and the same is hereby dismissed, with prejudice, against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood.

And then came the remaining parties to this action, to-wit, plaintiff and cross-defendant Lee H. Lytton, Jr., defendant and cross-plaintiff Jacob S. Floyd, intervenor Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, defendants and cross-defendants The John G. and Marie Stella Kenedy Memorial Foundation, Christopher Gregory, sometimes known as Brother Leo O.C.S.O., J. Peter Grace and the Attorney General of the State of Texas, all by and through their respective attorneys of record, and announced ready for trial; whereupon, a jury being waived by all parties, it was announced to the court that the parties hereto had agreed to compromise and settle all issues raised herein, as well as all issues made the basis of this suit, it being distinctly understood that in making this settlement no party makes any admission with regard to any of the allegations

made in the pleadings on file in this suit; and it further appearing that Lee H. Lytton, Jr. and Jacob S. Floyd have this day, in open court, ratified their resignations, dated June 13, 1960, as members of The John G. and Marie Stella Kenedy Memorial Foundation, and that the sole and only members of said The John G. and Marie Stella Kenedy Memorial Foundation now remaining are J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O.; and it further appearing to the court that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereupon, in open court, appointed, in compliance with the By-Laws of said The John G. and Marie Stella Kenedy Memorial Foundation, the following persons as members of such Foundation, to-wit:

Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office

Elena S. Kenedy

Lee H. Lytton, Jr.

Kenneth Oden

B.R. Goldapp

and it further appearing that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereafter, in open court, resigned from their respective offices as members and/or directors of said The John G. and Marie Stella Kenedy Memorial Foundation in compliance with the By-Laws of such Foundation; and it further appearing to the court that the aforesaid members, to-wit, Most Reverend M. S. Garriga, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth Oden and B.R. Goldapp, have, in open court, duly elected the following named persons as directors of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-Laws thereof, to-wit:

Most Reverend M. S. Garriga, Roman Catholic Bishop of
the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

Kenneth Oden

B.R. Goldapp

and it further appearing to the court that the aforesaid directors, have in open court, duly elected the following officers of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-laws thereof, to-wit:

Elena S. Kenedy - *President*

Bishop M. S. Garriga - *Vice President*

Kenneth Oden - *Secretary-Treasurer*

Lee H. Lytton, Jr. - *Assistant Secretary-Treasurer*

and it appearing to the court that the members have, in open court, adopted amendments to the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation, in the form of Exhibit A attached hereto and made a part hereof, and have, in open court, adopted amendments to the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation, which said amendments to the By-Laws are set forth in Exhibit B attached hereto and made a part hereof, and the court having examined said amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation are found the same to be in proper order and to reflect correctly the agreement of the parties and that such amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation should be approved and ratified by the court; and it appearing to the court, and the court having been fully advised in the premises, that the aforesaid compromise and settlement should be approved and that Judgment should be entered herein in accordance with such settlement agreed upon; and it further appearing to the court that the proper

officers of the said Foundation, also in open court, in accordance with this compromise agreement and Judgment have executed the instrument, a copy of which is attached to this Judgment and made a part hereof and marked Exhibit C, and which instrument has been examined by the court and found to be in proper order and to reflect correctly the agreement of the parties and such instrument should be approved and ratified by the court; and it further appearing to the court that all parties to this action acting by and through their duly authorized attorneys of record, in open court, have approved this Judgment by affixing their signatures hereto; and it further appearing to the court that the Attorney General of Texas, in open court, by and through his designated Assistant Attorney General, has stated that the Attorney General's Office has reviewed the terms, conditions and provisions of this settlement and all exhibits attached hereto, and that the said terms, conditions and provisions have been found to be in the best interests of the public beneficiaries of Texas, and therefore the Attorney General of Texas does hereby ratify and grant to this settlement according to the provisions of Article 4412a, Vernon's Civil Statutes of Texas, and the court being of the opinion that upon the recommendation of the Attorney General of Texas this settlement be in all things approved; It is accordingly ORDERED, ADJUDGED and DECREED by the court—

(1) That on the date of this Judgment, and pursuant to the appointment of members and election of directors and officers as aforesaid, the present and only duly and legally authorized and elected members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation are as follows:

Members: MOST REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
 ELENA S. KENEDY
 LEE H. LYTTON, JR.
 KENNETH ODEN
 B.R. GOLDAPP

Directors: MOST REVEREND M. S. GARRIGA, Roman
Catholic Bishop of the Diocese of Corpus
Christi

ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP

Officers: ELENA S. KENEDY - *President*
BISHOP M.S. GARRIGA - *Vice President*
KENNETH ODEN - *Secretary-Treasurer*
LEE H. LYTTON, JR. - *Assistant Secretary-
Treasurer*

(2) That the meetings and acts of the members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, as reflected by the minutes thereof, held or done in open court this day, be and they are in all things confirmed, ratified and approved as the legal and binding acts of The John G. and Marie Stella Kenedy Memorial Foundation.

(3) That the instrument executed by the President of The John G. and Marie Stella Kenedy Memorial Foundation and attested by its Secretary be and it is hereby declared to be the legal act of The John G. and Marie Stella Kenedy Memorial Foundation, a copy of such instrument, marked Exhibit C, being attached to and all of its terms being made a part of this Judgment, as if fully incorporated herein.

(4) That this suit, as to all issues raised herein by any party herein, be and the same is hereby dismissed, with prejudice, as against the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O. The John G. and Marie Stella Kenedy Memorial Foundation is hereby dismissed as a party defendant.

APPROVED AS TO FORM AND SUBSTANCE:

s/ LEE H. LYTTON, JR.
LEE H. LYTTON, JR.
Plaintiff

s/ JACOB S. FLOYD
JACOB S. FLOYD
Defendant and Cross-Plaintiff

PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas

By s/ KENNETH ODEN
KENNETH ODEN
Attorneys for Plaintiff Lee H. Lytton, Jr., Defendant
and Cross-Plaintiff Jacob S. Floyd and Executors of
the Estate of Sarita Kenedy East, Deceased

s/ M. S. GARRIGA
M.S. GARRIGA, Roman Catholic Bishop of the
Diocese of Corpus Christi
Intervenor

s/ ELMORE BORCHERS
ELMORE BORCHERS
Laredo, Texas
and

s/ PATRICK J. HORKIN, JR.
PATRICK J. HORKIN, JR.
717 Commerce Building
Corpus Christi, Texas
Attorneys for Intervenor M. S. Garriga, Roman
Catholic Bishop of the Diocese of Corpus Christi

s/ T. M. DOYLE
T. M. DOYLE
Defendant and Cross-Defendant

s/ JOHN J. MEEHAN
JOHN J. MEEHAN
Defendant and Cross-Defendant

s/ J. PETER GRACE
J. PETER GRACE
Defendant and Cross-Defendant

s/ REV. PATRICK J. PEYTON, C.S.C.
 REV. PATRICK J. PEYTON, C.S.C.,
 Defendant and Cross-Defendant,
 Acting Individually and as a Member of the
 Congregation of Holy Cross Under Valid Authority
 of His Lawful Religious Superior

s/ CHRISTOPHER GREGORY
 CHRISTOPHER GREGORY,
 Sometimes Known as Brother Leo, O.C.S.O.,
 Defendant and Cross-Defendant, Acting Individually
 and as a Religious of the Cistercian Order of the
 Strict Observance Under Valid Authority of His
 Lawful Religious Superior

BAKER, BOTTS, SHEPARD & COATES
 1600 Esperson Building
 Houston 2, Texas

s/ DENMAN MOODY
 DENMAN MOODY
 Attorneys for Defendants and Cross-Defendants
 Doyle, Meehan, Grace, Peyton and Gregory
 HENRIETTA K. ARMSTRONG
 Defendant and Cross-Defendant
 THOMAS M. ARMSTRONG
 Defendant and Cross-Defendant (pro forma)
 LAWRENCE E. WOOD
 Defendant and Cross-Defendant

KLEBERG, MOBLEY, LOCKETT & WEIL
 Jones Building
 Corpus Christi, Texas

By:

M. HARVEY WEIL
 Attorneys for Defendants and Cross-Defendants
 Henrietta K. Armstrong, Joined Pro Forma By Her
 Husband, Thomas M. Armstrong, and Lawrence
 Wood.

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION
Defendant and Cross-Defendant

By: BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

By s/ DENMAN MOODY
DENMAN MOODY

WAGGONER CARR
Attorney General of the State of Texas

By: s/ J. GORDON ZUBER
J. GORDON ZUBER
Assistant Attorney General

s/ JACOB S. FLOYD
JACOB S. FLOYD
Independent Executor of the Estate of Sarita Kenedy
East, Deceased

ALICE NATIONAL BANK OF ALICE, TEXAS
Independent Executor of the Estate of Sarita Kenedy East,
Deceased

By: s/ B.R. GOLDAPP
B.R. GOLDAPP

V

All temporary restraining orders heretofore issued by this Court are hereby vacated and dissolved, and by agreement of the parties hereto, they are hereby enjoined and restrained from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees, and representatives, insofar

BEST AVAILABLE COPY

as any such monies and/or royalties have heretofore been or may hereafter be received under the terms of any and all of the three following described instruments, to-wit:

- (1) That certain instrument dated April 21, 1960, recorded in the Oil & Gas Records of Kenedy County, Texas, in Volume 9, Pages 544 et seq.,
- (2) That certain instrument dated February 13, 1960, recorded in the Deed Records of Jim Hogg County, Texas, in Volume 42, Pages 52, et seq. and
- (3) That certain instrument dated January 2, 1961, recorded in the Oil & Gas Lease Records of Jim Hogg County, Texas, in Volume 50, Page 305, et seq.,

EXCEPTED, HOWEVER, from this temporary injunction and the terms and provisions thereof are any and all monies expended heretofore, or which may be expended hereafter, for the payment of taxes, or for payment of compensation to bookkeepers or auditors, and for investment in term United States Government securities; and they are further restrained and enjoined from assigning, transferring, conveying, pledging, mortgaging, or hypothecating any part or portion of the rights and/or properties purporting to pass from Sarita K. East to The John G. and Marie Stella Kenedy Memorial Foundation under the terms of any and all of said three instruments above described; PROVIDED, HOWEVER, that nothing contained in this temporary injunction shall in any wise be construed to affect, interfere with, or terminate in any manner, the existing rights of the said John G. and Marie Stella Kenedy Memorial Foundation, its officers, members, directors, agents, and representatives, to demand, collect, and receive all monies and/or royalties due, or to become due, from any person, firm, or corporation, under the terms of said three written instruments above described.

This is an interlocutory order and shall remain in full force and effect until further ordered by this Court.

VI

All costs of suit shall abide the issue.

VII

And it further appearing to the court that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled, Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, as a result of which, the parties hereto have refrained from executing and delivering the assignment, a copy of which is attached to this Judgment as Exhibit C;

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that all language hereinabove contained inconsistent with this finding is hereby amended and modified to conform hereto, and the proper parties and persons are hereby authorized and directed to execute, acknowledge and deliver such assignment upon the vacation or avoidance of such temporary injunction and the temporary injunction hereinabove provided for.

RENDERED AND SIGNED this 1st day of September, 1964.

s/C. W. LAUGHLIN

C. W. LAUGHLIN, *District Judge.*

ARTICLES OF AMENDMENT TO THE ARTICLES OF
INCORPORATION OF THE JOHN G. AND
MARIE STELLA KENEDY MEMORIAL FOUNDATION

Pursuant to the provisions of Article 4.03 of the Texas Non-Profit Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation which add thereto a new Article IX dealing with the membership of the Foundation and a new Article X dealing with the contributions to be made by the Foundation:

1. The name of the Corporation is The John G. and Marie Stella Kenedy Memorial Foundation.

2. The following amendment to the Articles of Incorporation was adopted by the Corporation on Sept. 1, 1964.

The Articles of Incorporation are hereby amended by adding thereto a new Article IX and a new Article X reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33½%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the

total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

3. The amendment was adopted in the following manner:

The amendment was adopted at a meeting of the members of the Foundation held on September 1, 1964, at which a quorum was present, and the amendment received at least two-thirds of the votes which members present or represented by proxy at such meeting were entitled to cast.

DATED _____; 19____

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION

By _____
Its President

Its Secretary

THE STATE OF TEXAS {
COUNTY OF JIM WELLS }

I, _____, a Notary Public, do hereby certify that on this _____ day of _____, 196____, personally appeared before me _____, and being duly sworn, declared that he is President of the

Corporation executing the foregoing document, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public in and for
Jim Wells County, Texas

My Commission Expires: _____

(Notarial Seal)

THE JOHN G. AND MARIE STELLA
KENEDY MEMORIAL FOUNDATION

Certified Copy of Amendments to By-Laws

I, _____, Secretary of The John G. and Marie Stella Kenedy Memorial Foundation, a non-profit charitable corporation organized and existing under the laws of the State of Texas, do hereby certify that at a meeting of the members and directors of such Foundation which was duly held in accordance with its By-Laws, the By-Laws of such Foundation were duly amended to cause Article III thereof to be amended to add as a part thereof new paragraphs 1a, 1b, and 1c reading as hereinbelow set forth, to add a new Article XI thereto reading as hereinbelow set forth, and to renumber the present Article XI of such By-Laws as Article XII, and that such amendments to its By-Laws of such Foundation are duly effective and have not been rescinded or modified in any manner.

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

- (i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

- (ii) at least two other practical Catholics;
- (iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, and said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33- $\frac{1}{3}$ %) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-Laws of The John G. and Marie Stella Kennedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

EXECUTED this ___ day of _____, 19__.

_____, Secretary
The John G. and Marie Stella
Kenedy Memorial Foundation

(SEAL)

THE STATE OF TEXAS {
COUNTY OF JIM HOGG

KNOW ALL MEN BY THESE PRESENTS: That The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Jacob S. Floyd and Alice National Bank, a national banking association with its place of business in Alice, Texas, jointly acting herein only in their capacity as executors of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars (\$10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation, Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas, (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in , under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 519-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other minerals produced and saved from the above described lands.

This sale conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said Lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

Recorded in Deed of
Lease* Records of
Jim Hogg County at

GRANTEE	DATE OF INSTRUMENT	VOLUME	PAGE
E. B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
I. E. Turcotte	September 1, 1947	28	534 et seq.
L. E. Turcotte	September 1, 1947	28	536 et seq.
L. E. Turcotte	February 28, 1955	39*	101 et seq.
L. E. Turcotte	June 22, 1956	41*	269 et seq.
L. E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1947	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars (\$25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above lands which provides (i) for a royalty of less than one-eighth ($1/8$ th) of all oil produced, saved and sold, of less than one-eighth ($1/8$ th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth ($1/8$ th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of \$10,000 or \$2 per acre for the lands leased, whichever shall be

the lesser amount, (iii) for delay rentals in excess of \$2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths (7/8ths) of one-eighth (1/8th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving

the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated _____ day of _____, 1963, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the _____ day of _____, 196 .

THE JOHN G. AND MARIE
STELLA KENEDY MEMORIAL
FOUNDATION

By: _____

President

GRANTOR

ATTEST:

Secretary

ALICE NATIONAL BANK

By: _____

President

ATTEST:

Cashier

Executors of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 3:45 o'clock p.m.

SEP 1 1964

Pauline Clinkscates
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

Entered November 23, 1979

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12,074

LEE H LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA
KENEDY FOUNDATION, ET AL.

FINAL JUDGMENT

BE IT REMEMBERED that on the 21st day of September, 1979 there came on to be heard the motion of the Honorable Mark White, Attorney General of the State of Texas, and others, for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, and the Court having heard all witnesses called by any party, and having read their written submissions and having fully considered the matter, it is the opinion of the Court that said motion should be granted; and

The temporary injunction referred to in Article VII of this Court's September 1, 1964 judgment as having theretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled *Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased*, against *The John G. and Marie Stella Kenedy Memorial Foundation, et al.*, having been dissolved and avoided with the dismissal with prejudice of that action on September 25, 1978, and all contests to the probate of the Will of Sarita K. East having been finally resolved and all other conditions to the entry of final judgment recited in *Gregory v. Lytton*, No. 14633 in the Court of Civil Appeals, San Antonio Division, having been fulfilled,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The motion for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, is granted in all respects.

2. The interlocutory injunctive provisions of Article V of the September 1, 1964 judgment are hereby vacated and dissolved and the said judgment is in all other respects reaffirmed and made final.

3. The John G. and Marie Stella Kenedy Memorial Foundation, the Alice national Bank of Alice, Texas, and the Estate of Sarita Kennedy East are hereby authorized and directed to take all steps necessary to execute, acknowledge, and deliver the instrument of assignment, in the form attached as Exhibit C to this Court's Judgment of September 1, 1964, as modified to take account of intervening events as shown by Exhibit A attached hereto, to the Sarita Kennedy East Foundation ("SKEF"), together with all royalty payments which have accrued thereon to SKEF and a proper accounting therefor.

4. This final judgment is without prejudice to the position of the respective parties concerning certain outstanding differences between them as to interest on such royalty payments and other matters concerning the proper interpretation of their settlement agreement.

5. All costs shall be taxed against the party incurring such costs for which execution shall issue if not timely paid.

RENDERED and SIGNED this 28th day of November, 1979.

s/ C.W. Laughlin
C.W. Laughlin
District Judge

THE STATE OF TEXAS {
COUNTY OF JIM HOGG

KNOW ALL MEN BY THESE PRESENTS: that The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under

the laws of the State of Texas, joined herein by Alice National Bank, a national banking association with its place of business in Alice, Texas, acting herein only in its capacity as executor of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars (\$10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend K.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 319-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other materials produced and saved from the above described lands.

This sale and conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said lands; provided, however, that this sale and conveyance, in so far as

it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

Recorded in Deed or
Lease* Records of
Jim Hogg County at

GRANTEE	DATE OF INSTRUMENT	VOLUME .	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1957	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars (\$25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above described lands which provides (i) for a royalty of less than one-eighth ($1/8$ th) of all oil produced, saved and sold, of less than one-eighth ($1/8$ th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth ($1/8$ th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of \$10,000 or \$2 per acre for the lands leased, whichever shall be

the lesser amount, (iii) for delay rentals in excess of \$2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths ($7/8$ ths) of one-eighth ($1/8$ th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving

the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated 1st day of September, 1964, and the Final Judgment in said Cause entered in November 1979, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand Dollars (\$14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

This instrument is subject to certain letter agreement dated February 20, 1964.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the day of 1979, as of the 1st day of April, 1962.

171a

THE JOHN G. AND MARIE
STELLA KENEDY MEMORIAL
FOUNDATION

By: _____
President

ATTEST:

GRANTOR

Secretary

ALICE NATIONAL BANK

By: _____
President

ATTEST:

Cashier

Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 4:06 o'clock p.m.

NOV 28 1979

Manuel M. Perez
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

CHRISTOPHER GREGORY,

APPELLANT,

v.

MARK WHITE, ATTORNEY GENERAL OF THE
STATE OF TEXAS Et Al.,

APPELLEES.

No. 16482.

COURT OF CIVIL APPEALS OF TEXAS,
SAN ANTONIO.

July 25, 1980.

OPINION

MURRAY, Justice.

This is an appeal by Christopher Gregory, also known as Brother Leo, from a judgment entered by the 79th Judicial District Court of Jim Wells County, Texas. The judgment in this cause determined who was entitled to serve as members and directors of The John G. and Marie Stella Kenedy Memorial Foundation, which was established by Sarita K. East prior to her death on February 11, 1961. This appeal represents the latest installment in the East will litigation, which began in the early 1960's.¹ The present suit was instituted in 1961 and was settled by agreement in 1963. The settlement agreement, reduced to writing and signed by all of the parties, was incorporated in a judgment on September 1, 1964. The judgment was expressly made interlocutory pending the outcome of two suits in which claims against the East estate were being adjudicated. Approximately eighteen months after the interlocutory judgment was rendered the appellant filed a petition in the nature of a bill of review to set it aside. The trial court dismissed the petition reasoning that the

¹ As pointed out by the supreme court in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), there have been numerous appeals involving the East estate. See *id.* at 684 n.1.

order was not a final judgment and was therefore not properly the subject of a suit in the nature of a bill of review. On appeal this court affirmed the trial court's action dismissing the appellant's petition. See *Gregory v. Lytton*, 422 S.W.2d 586, 591 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.)²

On July 24, 1979, the appellees filed a motion for the entry of final judgment arguing that the supreme court's decision in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), removed the last obstacle to making the September 1, 1964, judgment final. Subsequently, on September 14, 1979, the appellant filed a first amended motion to set aside the interlocutory judgment contending that the settlement agreement upon which the judgment was based is void for the following reasons: lack of authority, duress, failure of condition precedent, and because he no longer consented to the agreement.³

After a hearing the trial court granted the appellees' motion for the entry of final judgment. It is from this judgment that the appellant has perfected an appeal.

By several points of error the appellant contends that the trial court erred in entering a final judgment because (1) he notified the court prior to the entry of final judgment that he had withdrawn his consent to the settlement agreement; and (2) his consent to the settlement agreement was conditional and the condition has not been met.

[1, 2] A valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement the judgment of the court, the trial judge has knowledge that one of the parties to the suit has withdrawn his consent. Moreover, an agreed judgment should not be entered if the trial judge possesses information that would reasonable prompt further

² The background of this case is fully set out in *Gregory v. Lytton*, and will not be repeated here. We will, of course, provide additional facts necessary for an understanding of the disposition of this appeal.

³ Appellant's original motion to set aside the interlocutory judgment was filed on August 1, 1968.

inquiry, and this inquiry, if pursued, would disclose a lack of consent. See *Burnaman v. Heaton*, 150 Tex. 333, 339, 240 S.W.2d 288, 291-92 (1951).

[3] Once a settlement contract, agreed to by all of the parties to the suit, is incorporated in a judgment of the court, however, a party is precluded from attacking the validity of the judgment in the absence of an allegation and proof of fraud or collusion. This rule is simply an application of the general principle that one cannot complain of that to which he has agreed. See *De Lee v. Allied Finance Co.*, 408 S.W.2d 245, 247 (Tex.Civ.App.—Dallas 1966, no writ). In the instant case the evidence conclusively establishes that the appellant signed the settlement agreement and that the judge had no reason to know of any dissatisfaction that the appellant might have had with the agreement at the time the interlocutory judgment was rendered.

[4] There is no justification either in law or logic for applying a different rule to agreed interlocutory judgments than to agreed final judgments. An agreed interlocutory judgment would be of little value if its terms could be avoided by the withdrawal of consent of one of the parties. Accordingly, we hold that the above-stated principles governing agreed judgments apply to all consent judgments whether interlocutory or final.

[5] In support of his assertion that he never consented unconditionally to the settlement agreement the appellant relies on his own testimony adduced at the hearing on the appellees' motion for entry of final judgment. In this regard he testified that he was told by his superior that if he did not sign the agreement he would be excommunicated from the Catholic Church. He subsequently consulted another superior who suggested that he sign the document and attach to it a cover letter to the Holy See in Rome, which would require the Holy See's written approval before the settlement agreement was released to the court.

The appellant argues that his lawyers were not authorized to effect the settlement agreement since he had conditioned his consent on the approval of the Holy See and the condition has not been met. We disagree.

In April of 1961 the Houston, Texas, law firm of Baker & Botts was retained to represent the appellant and others, including The John G. and Marie Stella Kenedy Memorial Foundation. Thereafter, in 1963 a settlement agreement was entered into by the parties. The appellant signed this agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.

The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communicate to his attorneys the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. See *Allsman v. Robinson*, 25 S.W.2d 237, 239 (Tex.Civ.App.—El Paso 1930, no writ).

For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court.

CADENA, Chief Justice, dissenting.

There can be no quarrel with the holding by the majority that a consent interlocutory judgment cannot be set aside if it was entered prior to the time that the consent of one of the

parties was revoked. But appellant in this case complains of the fact that the trial court entered a final judgment without a hearing on the merits after he had made known to the court that he had withdrawn his consent to the agreement on which the agreed interlocutory judgment was based.

The authorities cited in the majority opinion hold that a valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement of the parties the judgment of the court the trial judge has knowledge that one of the parties to the agreement has withdrawn his consent or if, prior to rendition of the judgment, the trial court has knowledge of facts which would reasonably prompt further inquiry and such inquiry would disclose the lack of continued consent. It is clear in this case that, at the time the final judgment was rendered, the trial court was fully aware of the fact that appellant had revoked his consent. While it is true that at the time the interlocutory order was rendered the trial court had no reason to suspect that appellant was dissatisfied with the agreement, this fact can justify no more than a holding that the interlocutory order was properly rendered.

Since appellant did not consent to the rendition of the final judgment, basing such judgment on the repudiated agreement was clearly error. *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (1951).

CHRISTOPHER GREGORY,

APPELLANT,

v.

LEE H. LYTTON, JR., Et Al.,

APPELLEES.

No. 14633.

COURT OF CIVIL APPEALS OF TEXAS.

SAN ANTONIO.

Nov. 1, 1967.

Rehearing Denied Dec. 27, 1967.

KLINGEMAN, Justice.

This is an appeal from an order dismissing a petition in the nature of a bill of review in Cause No. 13850 in the District Court of Jim Wells County, 79th Judicial District, which bill of review was filed by appellant, Christopher Gregory, also referred to as Brother Leo, to review and set aside an order in Cause No. 12074, dated September 1, 1964, in the same court.

Appellant's only point of error is that the trial court erred in holding that the judgment in cause No. 12074 "is an interlocutory judgment and not a final judgment, and for such reason is not properly the subject of a suit in the nature of an equitable bill of review, and by reason of such holding in dismissing plaintiff's said suit for bill of review."

The principal question to be determined by this Court is whether the judgment of September 1, 1964, is interlocutory, and therefore not subject to bill of review, although appellee Bishop Drury has a counterpoint to the effect that even if the judgment in Cause No. 12074 was final, which he asserts is not the case, the record on its face shows that such judgment is based on a contract dated October 28, 1963, containing strict provisions for specific performance, and the bill of review of appellant filed on March 8, 1966, is thereby barred by limitation and laches.

The controversy involves the properties and affairs of Sarita K. East, who died on February 11, 1961. Prior to her death, Mrs. East organized and had incorporated under the Texas Non-Profit Corporation Act, the John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member thereof, but under date of February 11, 1960, Mrs. East appointed Jacob S. Floyd and Lee H. Lytton, Jr., as co-members of such foundation. Sometime thereafter she requested and received their resignations as members. On

December 30, 1960, Mrs. East made an additional appointment of Christopher Gregory as co-member during her lifetime. The will of Sarita K. East, dated January 22, 1960, in addition to devises to a number of relatives and former employees, left the residue of her estate to her foundation. A First codicil to said will, bearing the same date as the will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi as her successor to membership in such foundation upon her death. Thereafter, Mrs. East made Second, Third, Fourth and Fifth Codicils to such will, and under the Third Codicil revoked the First Codicil and appointed Peter Grace, Christopher Gregory and Father Patrick J. Peyton as successor members to her after her death. In such will Edgar Turcotte, Jacob S. Floyd and Alice National Bank were named executors. A contest to such will was filed in Kenedy County by Raul Trevino and others claiming to be blood heirs at law of Sarita K. East, and such will contest was pending at the time of the judgment of September 1, 1964. There was also pending at such time a suit in the District Court of Kenedy County to set aside certain inter vivos deeds from Sarita K. East to The John G. and Marie Stella Kenedy Memorial Foundation, and an injunction had issued out of the District Court of Kenedy County, Texas, in Cause No. 85, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased v. The John G. and Marie Stella Kenedy Memorial Foundation et al., wherein the parties thereto were enjoined from disposing or transferring certain purported assets of the foundation pending determination of the action.

Cause No. 12074 was commenced on the 19th day of April, 1961, by Lee H. Lytton, Jr., complaining of The John G. and Marie Stella Kenedy Memorial Foundation and others, including appellant, in which petition plaintiff asked that a temporary injunction issue pending trial of the case, enjoining appellant and others from withdrawing funds from the foun-

dation, from executing any contracts affecting certain lands, and other injunctive relief, and that on final hearing the court enter its declaratory judgment that Lytton and Jacob S. Floyd were the only legal members of the foundation; that defendants Gregory and Grace be required to file an accounting with the court and to return to the defendant foundation any assets received by them as a result of undue influence practiced by them on Mrs. East, and other relief. Thereafter, various answers, cross-actions, amended pleadings, and petitions of intervention were filed in said case by various parties, some of them seeking relief similar to that asked by plaintiff Lytton. The temporary injunctive relief prayed for was granted by the court, and the temporary injunction was continued from time to time. As a result of motions to strike, the plea of intervention filed in said cause by Raul Trevino et al., was stricken and dismissed from said cause, and the defendants in intervention, Alice National Bank, Edgar Turcotte and Jacob S. Floyd as Executors of the Estate of Sarita K. East, deceased, were dismissed from said suit insofar as said petition in intervention was concerned. An appeal therefrom was taken by Raul Trevino et al., and the Waco Court of Civil Appeals dismissed such appeal on the basis that it was not an appeal from a final judgment. *Kimmel v. Lytton*, Tex.Civ.App., 371 S.W.2d 927 (1963, writ ref'd).

On September 1, 1964, the trial court entered the order from which appellant sought a bill of review. The order recites that all parties to such action have approved the judgment, and on such judgment under the heading "Approved as to Form and Substance" is found the signature of appellant, Christopher Gregory, together with the signatures of other parties and attorneys in said cause. The order decrees certain people, not including appellant, to be the present and only legally authorized and elected members, directors, and officers of The John G. and Marie Stella Kenedy Memorial Foundation; confirms and ratifies certain amendments to the

Articles of Incorporation of such Foundation; vacates and dissolves temporary restraining orders theretofore issued; enjoins and restrains all parties from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any money or royalties heretofore or hereafter received by the Foundation under three instruments described in such order, with certain exceptions as to payment of taxes, etc.; dismisses various parties to the suit; recites that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, as a result of which the parties hereto have refrained from executing and delivering an assignment of a production payment in oil, gas and other minerals in certain lands, from the John G. and Marie Stella Kenedy Memorial Foundation to the Sarita Kenedy East Foundation, Inc., a copy of which instrument is attached to the judgment as an Exhibit, and the proper parties are authorized to execute, acknowledge, and deliver such assignment upon the vacation or avoidance of such temporary injunction hereinabove provided for. Said judgment further recites: "This is an interlocutory order and shall remain in full force and effect until further ordered by this Court," and provides that "All costs of suit shall abide the issue."

Appellant contends that the judgment of September 1, 1964, did dispose of all issues and parties in the case; that the injunction and order authorizing and directing a future act were merely incidental to the main relief granted; that the word "interlocutory" as used in such judgment was merely intended to show that the injunction therein issued was temporary in nature and would be dissolved by further order of the court when no longer necessary; that the mere fact that disposition of costs remain to be determined does not prevent a judgment from being final; and that evidence aliunde the judgment and pleadings in such cause is not determinative of the finality of such judgment. Appellant cites a number of cases in support of his contention, but, insofar as we have been

able to ascertain, none of such cases involved an agreed judgment and in none of them was it expressly stated by the trial court that the judgment was interlocutory.

Appellees contend that the judgment was not final because: (1) It was expressly stated otherwise in such judgment. (2) The order was interlocutory in its nature. (3) Further action of the court of some kind or character is contemplated and actually indispensable. (4) The costs of suit were left open and not taxed or paid. (5) The court itself, in addition to signing the order containing the language that it was interlocutory, made a docket entry indicating that the order was interlocutory and not final. (6) The clerk of the court continued to carry such case as an active case and not as a case closed by final judgment. (7) Some of the parties to such suit continued to file additional pleadings and other papers in said cause after the entry of the judgment. (8) The order standing alone is interlocutory in nature, but that such order expressly refers to a collateral settlement agreement which should be approved and judgment entered in accordance with such settlement agreement, which was admitted into evidence as an exhibit, makes the judgment in Cause No. 12074 contingent on the results of the will contest in Kenedy County, and when such judgment of September 1, 1964, is construed with the collateral agreement it is obvious that the judgment under attack is interlocutory and not final.

[1] The general rule is that a judgment to be final must dispose of all issues and parties in a case. *North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex.Sup.1966); *Hargrove v. Insurance Inv. Corp.*, 142 Tex. 111, 176 S.W.2d 744 (1944). But, as stated by Justice Calvert in *North East v. Aldridge*, supra, "The rule is deceiving in its apparent simplicity and vexing in its application." In 4 McDonald, Texas Civil Practice § 17.03 (1950), it is stated: "There is a great body of precedent upon the difficult question of whether a particular decision of the court represents a 'final' or an 'interlocutory' judgment. * * * It thus frequently becomes a problem in construction to determine whether the

particular decision was 'final' for the purpose of the question before the court. This problem must be resolved by a determination of the intention of the court gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties."

It appears clear that the court intended that such judgment be interlocutory, because not only does it expressly state so in such judgment, but in the judgment dismissing appellant's bill of review in the case on appeal the trial court makes findings, among others, that it was the intention of the parties and the court to enter a temporary order; that "The word 'interlocutory' contained in the temporary order entered in Cause No. 12,074 was used with cautious and deliberate design;" that by said wording the temporary order entered in said cause was expressly made interlocutory in its entirety.¹ As to the intentions and conduct of the parties, such judgment

¹ Other findings made by the court were: "(1) that at the time the temporary order was entered there was pending a contest of the Last Will and Testament of Sarita K. East, Deceased, being Cause No. 348 (hereinafter called the 'will contest') on the docket of the county Court of Kenedy County, Texas; (2) that the parties and this court in Cause No. 12,074 clearly recognized that the outcome of the will contest might substantially affect Cause No. 12,074 because the Last Will and Testament of Sarita K. East, Deceased, under attack in said will contest, devises and bequeaths her residuary estate to The John G. and Marie Stella Kenedy Memorial Foundation (hereinafter called the 'Foundation'); (3) that because the will contest involved assets of Sarita K. East, Deceased, which may, or may not be, ultimately administered by the Foundation, neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in said Cause No. 12,074; (4) that at the time the temporary order was entered there was also pending a suit to set aside certain inter vivos deeds from Sarita K. East, Deceased, to the Foundation, the same being Cause No. 85, styled Arnold R. Garcia vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al. on the docket of the District Court of Kenedy County, Texas, 105th Judicial District (hereinafter called the 'deed suit'); (5) that the parties and this Court in Cause No. 12,074 recognized that the outcome of the deed suit might substantially affect Cause No. 12,074 because said deed suit involves a substantial portion of the Foundation

of September 1, 1964, recites that all parties to such action have approved the same, and the judgment contains the signatures of appellant and other parties and attorneys in such suit. The record reflects that the court made a docket entry that such order was interlocutory; that on the docket of such court said case was continued to be carried as an active case, and after the date of such judgment there were entries made on different occasions, such as "passed," and that some of the parties continued to file additional pleadings in the case.

assets; (6) that consequently neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in Cause No. 12,074, due to the bearing of the deed suit upon said Cause No. 12,074; (7) that there existed the possibility of a number of issues or the entire action in Cause No. 12,074 being rendered moot if Plaintiffs in both the will contest and the deed suit were successful; (8) that the parties in Cause No. 12,074, intended to enter a temporary order which may become a final judgment in the event Plaintiffs in both the will contest and the deed suit are unsuccessful, but the parties in Cause No. 12,074 did not intend to provide for alternative judgments based upon other possible results in the will contest and the deed suit; (9) that although the temporary order entered in Cause No. 12,074 might lead to a final judgment, the outcome in the will contest and deed suit must first be known; (10) that it was the intention of the parties and the Court to enter a temporary order only in Cause No. 12,074 because of the various contingencies herein described; (11) that the settlement agreement executed by the parties and the agreed temporary order entered pursuant thereto in Cause No. 12,074 recognizes the possible effect which the will contest and the deed suit might have on any future final judgment in Cause No. 12,074 included in the temporary order a temporary injunction enjoining the parties from 'disposing of, dissipating, removing from the territorial limits of the State of Texas, or spending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees and representatives * * *'; which temporary injunction is still in full force and effect; (13) that the court therefor provided in its temporary order in said Cause No. 12,074, that all costs of suit would not be taxed until every entry of final judgment; and (14) that some of the parties amended their pleadings subsequent to the entry of the temporary order in Cause No. 12,074, * * *."

[2] This Court in *Culicchia v. Taormina*, Tex.Civ.App., 332 S.W.2d 803, 804 (1960, no writ), stated:

"In determining whether the judgment was a final one, we are limited largely to what the court stated by the judgment, and what might have been or could have been done is not the issue. There may be more than one way to write a judgment in an accounting suit, but we need only to determine what was done in this case.

"The judgment was carefully drawn and shows painstaking care in disposing of complex accounting problems. Throughout the judgment, the court makes rather clear what was intended, and while it is true that an instrument is what it is, without regard to the label appended to it, when a judgment contains words and internal evidences of its nature, we will not ignore them.

• • • •

See also the recent case of *State v. Starley*, 413 S.W.2d 451 (Tex.Civ.App.—Corpus Christi, 1967).

[3] In addition to the express statement in the judgment by the trial court to the effect that "This is an interlocutory order and shall remain in full force and effect until further ordered by this court," there are certain judicial acts to be performed by the trial court in said cause in the future. At some future date, it will be necessary for the trial court to act upon the temporary injunction provided for in such order, to assess all costs of suit, and to determine the effect of any change in the temporary injunction issued in the District Court of Kenedy County. See 33 Tex.Jur.2d Judgments § 85 (1962).¹

¹ "A final judgment is one that determines the rights of all the parties to the suit, and disposes of all the issues involved on their merits. Thus, a judgment is final where no further action adjudicating the rights of the parties may be taken by the court. But to constitute a final judgment it is not sufficient that the court has made a ruling that should logically lead to final disposition of the cause; the consequence of the ruling to the parties must be also declared. The very object of a suit is to adjudicate and declare respective rights so that

It is our opinion that appellees' counterpoint to the effect that the trial court correctly held that the judgment in Cause NO. 12074 is interlocutory and not the subject to attack by Bill of Review and appellant's suit was properly dismissed, should be sustained. In view of such holding, we do not pass upon appellee Father Drury's counterpoint that the Bill of Review of appellant is barred by limitation and laches.

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

IN THE SUPREME COURT OF TEXAS

No. B-9856

CHRISTOPHER GREGORY

DE.

MARK WHITE, ATTORNEY GENERAL ET AL

FROM JIM WELLS COUNTY,

FOURTH DISTRICT.

November 26, 1980

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Christopher Gregory and his surety Fidelity and Deposit Company, pay all costs incurred on this application.

the ministerial officers can with certainty carry the judgment into execution without the ascertainment of additional facts; where this is not the case the judgment is not final."

IN THE SUPREME COURT OF TEXAS

No. B-9856

CHRISTOPHER GREGORY

DE.

MARK WHITE, ATTORNEY GENERAL Et Al
FROM JIM WELLS COUNTY,
FOURTH DISTRICT.

January 7, 1981

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

First telegram from Thomas Keating to Robert Jewett.

Dated: August 30, 1964

I, the undersigned as the superior of Christopher Gregory (Brother Leo)

In virtue of an understanding which I have with him hereby authorize you to take the steps necessary to effectuate the settlement which the said Christopher Gregory has to here for sign the cause pending in the district court of Jim Wells County State of Texas 79th Judicial District Number 12074. Thomas Keating Abbot of St. Joseph's Abbey Spencer Mass.

Second telegram from Thomas Keating to Robert Jewett.

Dated: August 31, 1964

Regarding telegram Aug 31 from Spencer Mass signed Thomas Keating Abbot of St. Joseph's Abbey Spencer Mass.

Herewith duplicate and corrected copy of text, quote, I the undersigned as the superior of Christopher Gregory (Brother W. Leo) in virtue of an understanding which I have with him hereby authorize you to take the steps necessary to effectuate the settlement which the said Christopher Gregory has heretofore signed in the cause pending in the district court of Jim Wells County State of Texas 79th Judicial District Number 12074, unquote.

MONASTERIO CISTERCIENSE
CASILLA 189
LAS CONDES, CHILE

June 5, 1964

Mr. Kenneth Oden
Perkins, Floyd, Davis & Oden
Alice National Bank Building
Alice, Texas

Dear Ken:

This is to advise you that I hereby revoke and withdraw my approval and consent to the Settlement of the issues in the case of *Lytton v. Kenedy Memorial Foundation*. Such consent as I have given has been within the context of ecclesiastical influences very significant in my monastic life, of course, but unintelligible in the context of civil law and my natural law obligations towards the Kenedy East Foundation.

I also wish to advise you that neither Baker Botts, Shepherd and Coates of Houston or Cahill, Gordon, Reindel and Ohl have been acting as my attorney and are not authorized to speak for me.

Very truly yours,

BROTHER W. LEO

December 9, 1964

Kenneth Oden, Esq.
Perkins, Floyd, Davis & Oden
P.O. Drawer 331
Alice, Texas 78332

Dear Mr. Oden:

I have reviewed the copy of the judgment in *Lytton v. Kenedy Memorial Foundation, et al* which you sent me. After careful study of same, I find it necessary to bring to your attention the enclosed copies of two documents which I feel quite strongly should be called to the Court's attention. In view of the terms of the settlement and the fact that my client left these documents with me and is incommunicado, I have a professional obligation to see that the Court is advised that Brother Leo did not freely agree to the terms of the settlement and that he was not represented by counsel of his own choice in connection therewith. I would appreciate, therefore, hearing from you as soon as possible on this matter.

Very truly yours,

WILLIAM R. JOYCE, JR.

Enc.: 2
WJR:lk

CURTIS, MALLET-PREVOST, COLT & MOSLE

NEW YORK OFFICE

WALL STREET

NEW YORK, N.Y. 10005

PHONE 212-WH 4 2062

CABLE ADDRESS

FEDERAL BAR BUILDING

1815 H STREET, N.W.

WASHINGTON, D.C. 20006

Telephone 202-783-8759

MEXICO CITY OFFICE

AVENIDA JUAREZ 14

DESPACHOS 802-806

TELEPHONE 21-53-54

Cable Address "Migniard Washington D.C."

December 11, 1964

Leroy Denman Moody, Esq.

Messrs. Baker, Botts, Shepherd & Coates

Esperson Building

804 Travis Street

Houston 2, Texas

Dear Sir:

I am enclosing herewith a copy of a letter and its enclosures I mailed to Mr. Kenneth Oden on December 9, 1964 in connection with the lawsuit *Lytton v. Kenedy Memorial Foundation, et al.* In view of the representations made in the settlement submitted to the District Court in Alice, Texas in connection therewith, I find it necessary to call this matter to your attention immediately, and I would appreciate hearing from you as soon as possible on this matter.

Very truly yours,

s/ WILLIAM R. JOYCE, JR.

WILLIAM R. JOYCE, JR.

Enclosures

WRJ:lk

APPENDIX O

Supreme Court of the United States

OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 15, 1981

Ms. Amie Rodnick
Attorney General of Texas
Supreme Court Building
Austin, TX 78711

Re: *Christopher Gregory,*
v. *Mark White*, Attorney General of Texas,
et al.
No. 80-1677

Dear Ms. Rodnick:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

ALEXANDER L. STEVAS

ALEXANDER L. STEVAS,
Clerk

APPENDIX P

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,

Plaintiff

v.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY,
LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE,
Attorney General of the State of Texas, and THE
ALICE NATIONAL BANK,

Defendants

AMENDED COMPLAINT

PARTIES

1. The plaintiff Christopher Gregory ("Gregory") is a citizen of the United States who resides in Massachusetts.

2. Defendant Thomas J. Drury ("Drury") is the Bishop of the Diocese of Corpus Christi of the Roman Catholic Church, and purports to be a member of the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation"). Drury resides at 620 Lipan Street, Corpus Christi, Texas.

3. Defendant Bruno R. Goldapp ("Goldapp") purports to be a member of the Foundation, and resides at 721 First Street, Alice, Texas.

4. Defendant Elena S. Kenedy ("Kenedy") purports to be a member of the Foundation and resides in Sarita, Texas.

5. Defendant Lee H. Lytton, Jr. ("Lytton") purports to be a member of the Foundation and resides in Sarita, Texas.

6. Defendant Kenneth Oden ("Oden") is a lawyer in Alice, Texas and purports to be a member of the Foundation. Oden resides in or near Alice, Texas.

7. Defendant Mark White ("White") is and has been since 1978, the Attorney General of the State of Texas, with an office in Austin, Texas. White resides in or near Austin, Texas.

8. Defendant Alice National Bank ("the Bank") is organized under applicable national banking laws with a principal place of business in Alice, Texas. The bank is the executor of the estate of Sarita Kenedy East.

JURISDICTION AND VENUE

9. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

10. Defendant Mark White, Attorney General of the State of Texas, resides in or near Austin, Texas which lies within this judicial district and division. Venue is therefore proper pursuant to 28 U.S.C. § 1392(a).

FACTUAL BACKGROUND

11. On or about January 22, 1960, Sarita Kenedy East ("East") established the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation"), a charitable foundation established under the Texas Non-Profit Corporation Act.

12. The documents which established the Foundation were drafted by East's attorneys in Houston, Texas, and were executed by East in their offices. East executed a will in which she left the bulk of her estate to the Foundation at the same time she executed the documents which established the Foundation.

13. East was the only member of the Foundation at the time of its establishment. Pursuant to the articles of incorporation of the Foundation, the members of the Foundation have full power to appoint the Foundation's directors.

14. Between January 22, 1960 and December 30, 1960, East executed a number of documents in which she purported to appoint additional members to the Foundation. In February, 1960, East named two additional members of the Foundation, Lytton and Jacob Floyd ("Floyd") (now deceased). Lytton and Floyd subsequently resigned from membership in the Foundation at East's request.

15. On December 30, 1960 East, who was then the only member of the Foundation, appointed Gregory the second member of the Foundation.

16. On February 11, 1961 East died, leaving Gregory the sole surviving member of the Foundation.

17. On or about April 19, 1961 Lytton filed suit in the 79th District Court of Jim Wells County, Texas, against Gregory and others, seeking to have Gregory removed from membership in the Foundation and to have himself reinstated as a member. Lytton alleged as reason for the action that Gregory had exercised undue influence over East, which resulted in his and Floyd's voluntary resignations from the Foundation.

COUNT I

18. Gregory repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 17 above.

19. Commencing in or about April, 1961 and continuing through June, 1981, the defendants White (and White's predecessors in the office of Attorney General of Texas), Drury (and Drury's predecessor Bishop Garriga, now deceased), Goldapp, Kenedy, Lytton, Oden and the

Bank (hereinafter referred to collectively as "the defendants"), along with Floyd, Robert K. Jewett ("Jewett") and Denman Moody ("Moody"), both of whom are lawyers in Houston, Texas, and others whose identities are presently unknown to Gregory, combined and conspired for the common purpose of depriving Gregory of his right to trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and his right to trial by jury, guaranteed by Texas law.

20. In furtherance of the conspiracy described in paragraph 19 above, the defendants, individually and jointly, along with their co-conspirators, have undertaken a course of conduct which included the following actions:

(a) On or about April 19, 1961, Lytton, in combination with others, filed a lawsuit in a state court of Texas against Gregory and others, which was without foundation and which was brought in bad faith. Lytton alleged that Gregory had exercised undue influence over East, causing her to request Lytton's resignation from the Foundation. In accordance with Texas law, White's predecessor in the office of Attorney General of Texas was made a party to the lawsuit. On information and belief, Lytton brought this lawsuit not intending to prosecute it, but for the purpose of coercing Gregory into resigning from the Foundation and naming Lytton in his place. Several months after initiation of the lawsuit, Gregory retained a lawyer in Washington, D.C., William R. Joyce, Jr. ("Joyce"), to represent him in connection with that lawsuit.

(b) Soon after initiation of the lawsuit, the defendants and their co-conspirators further sought to exercise coercion, duress and undue influence upon Gregory through his position as a member of the Order of Cistercians of the Strict Observance, also known as the Trappists, in an attempt to force Gregory to accede to their wishes. On information and belief, they caused Gregory to be threatened by his religious superiors with excommunica-

tion from the Roman Catholic Church and expulsion from the Trappist Order, if he did not give up his position as a member of the Foundation without a trial on the merits of the lawsuit against him.

(c) In the spring of 1962, Gregory was called to a meeting in Philadelphia by his religious superiors where he was told to discharge Joyce as his counsel, and to accede to the defendants' demands. On information and belief, the defendants and their co-conspirators had induced Gregory's religious superiors to hold this meeting and to order Gregory to cooperate. Gregory refused to give up his right to be a member of the Foundation and his right to a trial of the charges against him.

(d) The defendants and their co-conspirators continued to exercise coercion and duress upon Gregory. Finally, in May, 1962, Gregory signed a resignation from the Foundation as a result of the orders of his religious superiors. Gregory knew, however, that the resignation would not become effective until it was accepted by a vote of the Foundation's directors, of which he was one.

(e) The defendants and their co-conspirators demanded that Gregory also enter into a settlement agreement which would resolve the pending litigation without trial on the merits. Gregory refused to consent to the proposed settlement. In an effort to coerce Gregory into consenting, on information and belief, the defendants caused him to be sent to a monastery in Chile in the winter of 1963 where he would be unable to contact his counsel and would be more susceptible to their coercion.

(f) While in Chile, Gregory revoked the resignation which he had signed in May, 1962 but which had never been made effective by action of the Foundation's directors. Gregory sent his written revocation of resignation to his counsel, who filed it with the Texas court and sent a copy to Cden's partner, Floyd.

(g) The defendants and their co-conspirators continued to seek Gregory's consent to a settlement of the lawsuit through their course of coercion. As a result of their continued efforts, Gregory's will was eventually overcome and he signed, in September, 1963 in Chile a settlement agreement urged by the defendants. He signed that agreement only conditionally, however, with a written statement of the conditions upon which he consented attached to the agreement.

(h) Several months after Gregory's conditional consent to the settlement, Gregory was ordered by his religious superiors to a meeting in Miami, Florida attended by Jewett, Oden and others of the defendants and their co-conspirators, as well as by Gregory's religious superior. At that meeting, in January, 1964, the defendants and their co-conspirators requested Gregory's further cooperation, and presented him with a new resignation and a power of attorney to sign. Despite threats by his religious superiors of excommunication from the Roman Catholic Church and expulsion from the Trappist Order if he did not sign, Gregory reasserted his own will and refused. In addition, Gregory orally revoked whatever conditional consent to the settlement he had previously given, and stated that Jewett was not authorized to represent his interests in any way.

(i) In June, 1964, Gregory was sent to a monastery in northern Canada which was even more remote than the monastery in which he was located in Chile. On information and belief, the defendants caused his relocation to Canada for the purpose of bringing even more duress and coercion to bear upon him. He was instructed by his religious superiors to speak to no one, including his attorney, Joyce, about the lawsuit while there.

(j) Despite Gregory's clear indication of his lack of consent to the settlement and his refusal to cooperate with the defendants, the defendants and their co-conspirators continued their attempts to overcome Gregory's will

and desires. As a result of the demands of his religious superiors, Gregory signed a memorandum prepared by others for his signature in July, 1964, addressed to his Abbott, Thomas Keating ("Keating"), in which he attempted to reconcile his refusal to cooperate with the defendants with his religious conscience.

(k) In late August, 1964, while Gregory was living in isolation in Canada and was not being informed about the progress of the litigation in Texas, Keating requested from Gregory his further cooperation with the settlement. On information and belief, this request by Keating was made at the instance of the defendants and their co-conspirators. Gregory reasserted his own will and refused to agree with the settlement. Nevertheless, on the advice of the defendants and their co-conspirators, Keating, purporting to act on behalf of Gregory but without authority to do so, sent a telegram on August 30, 1964 to Jewett assenting to the settlement.

(l) On September 1, 1964, at the request of the defendants and their co-conspirators, the trial court in Texas held a hearing at which the defendants and their co-conspirators represented to the trial judge that a settlement of the dispute had been reached. Neither Gregory nor his attorney, Joyce, had any notice of this hearing, and neither was present. At the hearing, Jewett, acting on behalf of the defendants and their co-conspirators, made the following representations to the court:

1. That Gregory's May, 1962 resignation from the Foundation was valid and effective. In fact, that resignation had been revoked in writing in September, 1963, which the defendants and their co-conspirators well knew.
2. That Gregory's alleged consent to the settlement terms was valid and unconditional. In fact, Gregory's consent, which had been only conditional when given, had been expressly revoked,

which the defendants and their co-conspirators well knew. In addition, certain terms of the alleged settlement agreement had been altered.

3. That the telegram from Keating, purporting to act on Gregory's behalf, to Jewett constituted the exercise of a valid and effective power of attorney, when the defendants and their co-conspirators knew that Gregory had repeatedly refused to sign a power of attorney and had not intended to empower Keating to give one on his behalf.
4. That Jewett represented Gregory's interests in the litigation, when Jewett, the defendants and the other co-conspirators knew that Gregory was represented by Joyce and that Gregory explicitly denied that Jewett was his lawyer.

(m) The defendants and their co-conspirators scheduled the hearing before the trial court for September 1, 1964 with the knowledge that Gregory could not be present because of his isolation in Canada. Moreover, they did not notify Gregory or his attorney, Joyce, of the hearing to insure that neither was present. Their purpose was to insure that the settlement agreement was confirmed as a judgment, and to insure that Gregory was not afforded a trial on the merits. Gregory's physical absence from the proceeding was necessary for the defendants to effect their scheme and bind him by judicial decree to a settlement to which he had not consented.

(n) Throughout the course of the litigation in the Texas state courts described above, White's predecessor in the office of Attorney General of Texas was obliged by state law to represent the public interest in that lawsuit, and was bound by his office to act in accordance with law. White's predecessor wholly failed and neglected to represent the public interest in that lawsuit. Moreover, on information and belief, White's predecessor approved

of the alleged settlement, which approval was required by law, for the improper and unlawful reason of insuring that all Foundation funds would be distributed in Texas instead of in accordance with the wishes of the foundress.

21. As a result of the conduct of the defendants and their co-conspirators described in paragraph 20 above, the trial court entered an interlocutory judgment on September 1, 1964 incorporating in full the terms of the alleged settlement agreement, without any trial on the merits or by jury.

22. Subsequent to the entry of the September 1, 1964 judgment, the defendants and their co-conspirators have resisted Gregory's attempts to reveal his lack of consent to the court, to vacate that judgment, and to obtain a trial on the merits and by jury. Among the actions of the defendants and their co-conspirators are the following:

(a) The defendants and their co-conspirators continued to exercise coercion, duress and undue influence on Gregory by causing him to continue to be threatened by his religious superiors with excommunication from the Roman Catholic Church and expulsion from the Trappist Order if he sought to upset the interlocutory judgment. Gregory nevertheless attempted to have that judgment vacated. Gregory was thereafter dismissed from the Trappist Order in March, 1966, as a result.

(b) In 1979, after resolution of a contest over the validity of East's will which caused the September 1, 1964 judgment to be interlocutory, White, acting on behalf of the defendants and their co-conspirators, requested that the trial court make the interlocutory judgment final and binding upon Gregory, despite the fact that Gregory contended that he had never consented to the settlement agreement, which White and the other defendants well knew, and despite their knowledge that Gregory did not consent at that time. White, by failing

to undo the wrong caused the public in and prior to 1964, perpetuated that wrong in violation of his duty under law.

(c) As a result of the actions of the defendants and their co-conspirators, the trial court made the interlocutory judgment final and binding on November 28, 1979 without any trial by jury or otherwise, on the merits of the complaint.

(d) The defendants and their co-conspirators continued to resist Gregory's efforts to obtain review of the judgments against him through June 15, 1981.

23. The conduct of the defendants and their co-conspirators described in paragraphs 20 and 22 above was undertaken for the purpose of depriving Gregory of the rights to trial and to trial by jury on the charges of undue influence brought against him by Lytton.

24. The conduct of the defendants and their co-conspirators described in paragraphs 20 and 22 above resulted in the deprivation of Gregory's rights to trial and to trial by jury, as the defendants and their co-conspirators intended.

25. As a result of the conduct of the defendants and their co-conspirators, Gregory has been wrongfully excluded from his position as a member of the Foundation and has been wrongfully prevented from directing use of the funds of the Foundation in accordance with East's desires as he should determine them.

26. The conduct of the defendants violates the Fifth and Fourteenth Amendments to the United States Constitution, as well as Texas law.

COUNT II

27. Gregory repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 17 and 19 through 25 above.

28. White and his predecessors in office, as Attorneys General of the State of Texas, were acting under color of state law in actively participating in the combination and conspiracy described in paragraphs 19 through 22 above, with knowledge that their actions were likely to result in the deprivation of Gregory's constitutional rights.

29. The conduct of the defendants violates 42 U.S.C. § 1983.

WHEREFORE, the plaintiff Christopher Gregory requests that the Court, after trial, enter judgment in his favor and order the following relief:

1. Enjoin the defendant Alice National Bank and the defendants who purport to be members of the Foundation from disbursing, conveying or distributing any funds of the estate of Sarita Kenedy East or of the Foundation;

2. Order an audit of the defendant Alice National Bank and a full accounting from the Bank and from the defendants who purport to be members of the Foundation of all funds of the estate of Sarita Kenedy East and of the Foundation from February 11, 1961 through the present;

3. Order the defendants to resign as members and directors of the Foundation and to appoint Gregory as sole member as their successor;

4. Order the defendant Mark White, Attorney General of Texas, to approve on behalf of the State of Texas, the resignations of the defendants from the Foundation and the appointment of Gregory, as sole member, as is required under Texas law to effect such a change in the Foundation articles;

5. Award him the costs of this action; and

6. Such other and further relief as the Court deems just and proper.

**THE PLAINTIFF DEMANDS A TRIAL BY JURY
TO THE FULL EXTENT TO WHICH HE IS EN-
TITLED BY LAW.**

Dated: March 30, 1982

CHRISTOPHER GREGORY

By his attorneys,

/s/ (orig. signed)

JAMES D. ST. CLAIR, P.C.

BARBARA L. MOORE

HALE AND DORR

60 State Street

Boston, Massachusetts 02109

(617) 742-9100

Of Counsel:

/s/ (orig. signed)

JAMES R. WEDDINGTON

FRIEDMAN, WEDDINGTON AND HANSEN

515 Stewart Title Building

812 San Antonio Street

Austin, Texas 78701

APPENDIX Q

No. 14633.

522 SW 2d 586

CHRISTOPHER GREGORY,

Appellant

v.

LEE H. LYTTON, JR., ET AL,

Appellees

Court of Civil Appeals of Texas

San Antonio, Texas

Nov. 1, 1967.

Rehearing Denied Dec. 27, 1967

Petitioner filed bill to review and set aside an order of the court decreeing certain people to be the only legally authorized and elected members, directors, and officers of the foundation. The 79th District Court, Jim Wells County, C. W. Laughlin, J., dismissed the bill of review and petitioner appealed. The Court of Civil Appeals, Klingeman, J., held that where trial court expressly stated in the order that it was interlocutory and made docket entry that the order was interlocutory and continued case on the docket as an active case and where it was necessary that at a future date the trial court act on temporary injunction provided for in the order, to assess all costs of suit and to determine the effect of any change in temporary injunction issued by another district court, the order was interlocutory and not subject to attack by bill of review.

Judgment affirmed.

1. Judgment (key)217

Generally for a judgment to be final, it must dispose of all issues and parties in a case.

2. Appeal and Error (key)78(1)

In determining whether judgment is final one, reviewing court is limited to what the court stated by the judgment.

3. Judgment (key)355(1)

Where trial court expressly stated in the order that it was interlocutory and made docket entry that the order was interlocutory and continued case on the docket as an active case and where it was necessary that at a future date the trial court act on temporary injunction provided for in the order, to assess all costs of suit and to determine the effect of any change in temporary injunction issued by another district court, the order was interlocutory and not subject to attack by bill of review.

Frances Tarlton Farenthold, Wood, Boykin, Rylee & Wolter, Corpus Christi, for appellant.

Perkins, Floyd, Davis & Oden, Alice, Horkin, Nicolas & Nicolas, Corpus Christi, Elmore H. Borchers, Laredo, for appellees.

KLINGEMAN, Justice.

This is an appeal from an order dismissing a petition in the nature of a bill of review in Cause No. 13850 in the District Court of Jim Wells County, 79th Judicial District, which bill of review was filed by appellant, Christopher Gregory, also referred to as Brother Leo, to review and set aside an order in Cause No. 12074, dated September 1, 1964, in the same court.

Appellant's only point of error is that the trial court erred in holding that the judgment in cause No. 12074 "is an interlocutory

judgment and not a final judgment, and for such reason is not properly the subject of a suit in the nature of an equitable bill of review, and by reason of such holding in dismissing plaintiff's said suit for bill of review."

The principal question to be determined by this Court is whether the judgment of September 1, 1964, is interlocutory, and therefore not subject to bill of review, although appellee Bishop Drury has a counterpoint to the effect that even if the judgment in Cause No. 12074 was final, which he asserts is not the case, the record on its face shows that such judgment is based on a contract dated October 28, 1963, containing strict provisions for specific performance, and the bill of review of appellant filed on March 8, 1966, is thereby barred by limitation and laches.

The controversy involves the properties and affairs of Sarita K. East, who died on February 11, 1961. Prior to her death, Mrs. East organized and had incorporated under the Texas Non-Profit Corporation Act, The John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member thereof, but under date of February 11, 1960, Mrs. East appointed Jacob S. Floyd and Lee H. Lytton, Jr., as co-members of such foundation. Sometime thereafter she requested and received their resignations as members. On December 30, 1960, Mrs. East made an additional appointment of Christopher Gregory as co-member during her lifetime. The will of Sarita K. East, dated January 22, 1960, in addition to devises to a number of relatives and former employees, left the residue of her estate to her foundation. A First Codicil to said will, bearing the same date as the will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi as her successor to membership in such foundation upon her death. Thereafter, Mrs. East made Second, Third Fourth and Fifth Codicils to such will, and under the Third Codicil revoked the First Codicil and appointed Peter Grace, Christopher Gregory and Father Patrick J. Peyton as successor

members to her after her death. In such will Edgar Turcotte, Jacob S. Floyd and Alice National Bank were named executors. A contest to such will was filed in Kenedy County by Raul Trevino and others claiming to be blood heirs at law of Sarita K. East, and such will contest was pending at the time of the judgment of September 1, 1964. There was also pending at such time a suit in the District Court of Kenedy County to set aside certain inter vivos deeds from Sarita K. East to the John G. and Marie Stella Kenedy Memorial Foundation, and in injunction had issued out of the District Court of Kenedy County, Texas, in Cause No. 85, styled Arnold R. Garcia, Temporary Administrator of the *Estate of Sarita Kenedy East, Deceased v. The John G. and Marie Stella Kenedy Memorial Foundation et al*, wherein the parties thereto were enjoined from disposing or transferring certain purported assets of the foundation pending determination of the action.

Cause No. 12074 was commenced on the 19th day of April 1961, by Lee H. Lytton, Jr., complaining of the John G. and Marie Stella Kenedy Foundation and others, including appellant, in which petition plaintiff asked that a temporary injunction issue pending trial of the case, enjoining appellant and others from withdrawing funds from the foundation, from executing any contracts affecting certain lands, and other injunctive relief, and that on final hearing the court enter its declaratory judgment that Lytton and Jacob S. Floyd were the only legal members of the foundation; that defendants Gregory and Grace be required to file an accounting with the court and to return to the defendant foundation any assets received by them as a result of undue influence practiced by them on Mrs. East, and other relief. Thereafter, various answers, cross-actions, amended pleadings, and petitions of intervention were filed in said case by various parties, some of them seeking relief similar to that asked by plaintiff Lytton. The temporary injunctive relief prayed for was granted by the court, and the temporary injunction was continued from time to time. As a result of motions to strike, the plea of

intervention filed in said cause by Raul Trevino et al., was stricken and dismissed from said cause, and the defendants in intervention, Alice National Bank, Edgar Turcotte and Jacob S. Floyd as Executors fo the Estate of Sarita K. East, deceased, were dismissed from said suite insofar as said petition in intervention was concerned. An appeal therefrom was taken by Raul Trevino et al., and the Waco Court of Civil Appeals dismissed such appeal on the basis that it was not an appeal from a final judgment. Kimmel V. Lytton, Tex. Civ. App., 371 S.W.2d 927 (1963, writ ref'd).

On September 1, 1964, the trial court entered the order from which appellant sought a bill of review. The order recites that all parties to such action have approved the judgment, and on such judgment under the heading "*Approved as a Form and Substance*" is found the signature of appellant, Christopher Gregory, together with the signature of other parties and attorneys in said cause. The order decrees certai people, not including appellant, to be the present and only legally authorized and elected members, directors and officers of the John G. and Marie Stella Kenedy Foundation; confirms and ratifies certain amendments to the Articles of Incorporation of such Foundation; vacates and dissolves temporary restraining orders theretofore issued; enjoins and retrains all parties from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any money or royalties heretofore or hereafter received by the Foundation under three instruments described in such order, with certain exceptions as to payment of taxes, etc.; dismisses various parties to the suit; recites that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, as a result of which the parties hereto have refrained from executing and delivering an assignment of a production payment in oil, gas and other minerals in certain lands, from the John G. and Marie Stella Kenedy Memorial Foundation to the Sarita Kenedy East Foundation, Inc., r copy of which instrument is attached to the judgment as an Exhibit, and the proper parties are authorized to

execute, acknowledge, and deliver such assignment upon the vacation or avoidance of such temporary injunction and the temporary injunction hereinabove provided for. Said judgment further recites: "This is an interlocutory order and shall remain in full force and effect until further ordered by this Court," and provides that "All costs of suit shall abide the issue."

Appellant contends that the judgment of September 1, 1964, did dispose of all issues and parties in the case; that the injunction and order authorizing and directing a future act were merely incidental to the main relief granted; that the word "interlocutory" as used in such judgment was merely intended to show that the injunction therein issued was temporary in nature and would be dissolved by further order of the court when no longer necessary; that the mere fact that disposition of costs remain to be determined does not prevent a judgment from being final; and that evidence aliunde the judgment and pleadings in such cause is not determinative of the finality of such judgments. Appellant cites a number of cases in support of his contention, but, insofar as we have been able to ascertain, none of such cases involved an agreed judgment and in none of them was it expressly stated by the trial court that the judgment was interlocutory.

Appellees contend that the judgment was not final because:

- (1) It was expressly stated otherwise in such judgment.
- (2) The order was interlocutory in its nature.
- (3) Further action of the court of some kind or character is contemplated and actually indispensable.
- (4) The costs of suit were left open and not taxed or paid.
- (5) The court itself, in addition to signing the order containing the language that it was interlocutory, made a docket entry indicating that the order was interlocutory and not final.
- (6) The clerk of the court continued to carry such case as an active case and not as a case closed by final judgment.
- (7) Some of the parties to such suit continued to file additional pleadings and other papers in said cause after the entry of the judgment.
- (8) The order standing alone is interlocutory in nature, but that

such order expressly refers to a collateral settlement agreement which should be approved and judgment entered in accordance with such settlement agreement; and that such settlement agreement; which was admitted into evidence as an exhibit, makes the judgment in Cause No. 12074 contingent on the results of the will contest in Kenedy County, and when such judgment of September 1, 1964, is construed with the collateral agreement it is obvious that the judgment under attack is interlocutory and not final.

[1] The general rule is that a judgment to be final must dispose of all issues and parties in a case. *North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex. Sup. 1966); *Hargrove v. Insurance Inv. Corp.*, 142 Tex. 111, 176 S.W.2d 744 (1944). But, as stated by Justice Calvert in *North East v. Aldridge*, supra, "The rule is deceiving in its apparent simplicity and vexing in its application." In 4 McDonald, Texas Civil Practice § 17.03 (1950), it is stated: "There is a great body of precedent upon the difficult question of whether a particular decision of the court represents a 'final' or an 'interlocutory' judgment. * * * It thus frequently becomes a problem in construction to determine whether the particular decision was 'final' for the purpose of the question before the court. This problem must be resolved by a determination of the intention of the court gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties."

It appears clear that the court intended that such judgment be interlocutory, because not only does it expressly state so in such judgment, but in the judgment dismissing appellant's bill of review in the case on appeal the trial court makes findings, among others, that it was the intention of the parties and the court to enter a temporary order; that "The word 'interlocutory' contained in the temporary order entered in Cause No. 12,074 was used with cautious and deliberate design;" that by said wording the temporary order entered in said cause was expressly made inter-

locutory in its entirety.¹

¹ Other findings made by the court were: "(1) that at the time the temporary order was entered there was pending a contest of the Last Will and Testament of Sarita K. East, Deceased, being Cause No. 348 (hereinafter called the 'will contest') on the docket of the County Court of Kenedy County, Texas; (2) that the parties and this Court in Cause No. 12,074 clearly recognized that the outcome of the will contest might substantially affect Cause No. 12,074 because the Last Will and Testament of Sarita K. East, Deceased, under attack in said will contest, devises and bequeaths her residuary estate to the John G. and Marie Stella Kenedy Memorial Foundation (hereinafter called the 'Foundation'); (3) that because the will contest involved assets of Sarita K. East, Deceased, which may, or may not be, ultimately administered by the Foundation, neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in said Cause No. 12,074; (4) that at the time the temporary order was entered there was also pending a suit to set aside certain inter vivos deeds from Sarita K. East, Deceased, to the Foundation, the same being Cause No. 85, styled Arnold R. Garcia vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, on the docket of the District Court of Kenedy County, Texas, 105th Judicial District (hereinafter called the 'deed suit'); (5) that the parties and this Court in Cause No. 12,074 recognized that the outcome of the deed suit might substantially affect Cause No. 12,074 because said deed suit involves a substantial portion of the Foundation assets; (6) that consequently neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in Cause No. 12,074, due to the bearing of the deed suit upon said Cause No. 12,074; (7) that there existed the possibility of a number of issues or the entire action in Cause No. 12,074 being rendered moot if Plaintiffs in both the will contest and the deed suit were successful; (8) that the parties in Cause No. 12,074, intended to enter a temporary order which may become a final judgment in the event Plaintiffs in both the will contest and the deed suit are unsuccessful, but the parties in Cause No. 12,074 did not intend to provide for alternative judgments based upon other possible results in the will contest and the deed suit; (9) that although the temporary order entered in Cause No. 12,074 might lead to a final judgment, the outcome in the will contest and deed suit must first be known; (10) that it was the intention of the parties and the Court to enter a temporary order only in Cause No. 12,074 because of the various contingencies herein described; (11) that the settlement agreement executed by the parties and the agreed temporary order entered pursuant thereto in Cause No. 12,074 recognizes the possible effect which the will contest and the deed suit might have on any future final judgment in Cause No. 12,074; (12) that because of the various contingencies, this Court in its order in Cause No. 12,074 included in the temporary order a temporary injunction enjoining the

As to the intentions and conduct of the parties, such judgment of September 1, 1964, recites that all parties to such action have approved the same, and the judgment contains the signatures of appellant and other parties and attorneys in such suit. The record reflects that the court made a docket entry that such order was interlocutory; that on the docket of such court said case was continued to be carried as an active case, and after the date of such judgment there were entries made on different occasions, such as "passed," and that some of the parties continued to file additional pleadings in the case.

[2] This Court in *Culicchia v. Taormina*, Tex. Civ. App., 332 S.W.2d 803, 804 (1960, no writ), stated:

"In determining whether the judgment was a final one, we are limited largely to what the court stated by the judgment, and what might have been or could have been done is not the issue. There may be more than one way to write a judgment in an accounting suit, but we need only to determine what was done in this case.

"The judgment was carefully drawn and shows painstaking care in disposing of complex accounting problems. Throughout the judgment, the court makes rather clear what was intended, and while it is true that an instrument is what it is, without regard to the label appended to it, when a judgment contains words and internal evidences of its nature, we will not ignore them. * * *

"The court explicitly and repeatedly stated that this was an interlocutory and not a final judgment. *Ball v. Nelms*, Tex. Civ. App., 293 S.W. 335. * * *

parties from 'disposing of, dissipating, removing from the territorial limits of the State of Texas, or spending any monies and/or royalties heretofore or hereafter received by the John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees and representatives * * *,' which temporary injunction is still in full force and effect; (13) that the court therefor provided in its temporary order in said Cause No. 12,074, that all costs of suit would not be taxed until entry of final judgment; and (14) that some of the parties amended their pleadings subsequent to the entry of the temporary order in Cause No. 12,074, * * *."

See also the recent case of *State v. Starley*, 413 S.W.2d 451 (Tex. Civ. App. — Corpus Christi, 1967).

[3] In addition to the express statement in the judgment by the trial court to the effect that "This is an interlocutory order and shall remain in full force and effect until further ordered by this court," there are certain judicial acts to be performed by the trial court in said cause in the future. At some future date, it will be necessary for the trial court to act upon the temporary injunction provided for in such order, to assess all costs of suit, and to determine the effect of any change in the temporary injunction issued in the District Court of Kenedy County. See 33 Tex. Jur. 2d Judgments § 85 (1962).²

It is our opinion that appellees' counterpoint to the effect that the trial court correctly held that the judgment in Cause No. 12074 is interlocutory and not subject to attack by Bill of Review and appellant's suit was properly dismissed, should be sustained. In view of such holding, we do not pass upon appellee Father Drury's counterpoint that the Bill of Review of appellant is barred by limitation and laches.

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

END

(KEY)

² "A final judgment is one that determines the rights of all the parties to the suit, and disposes of all the issues involved on their merits. Thus, a judgment is final where no further action adjudicating the rights of the parties may be taken by the court. But to constitute a final judgment it is not sufficient that the court has made a ruling that should logically lead to a final disposition of the cause; the consequence of the ruling to the parties must be also declared. The very object of a suit is to adjudicate and declare respective rights so that the ministerial officers can with certainty carry the judgment into execution without the ascertainment of additional facts; where this is not the case the judgment is not final."

APPENDIX R

499 SW 2d 705

No. 661.

Court of Civil Appeals

OF TEXAS, SAN ANTONIO.

SEPT. 24, 1973

REHEARING DENIED OCT. 31, 1973

PATRICK A. TURCOTTE, ET AL.,

Appellants,

v.

RAUL TREVINO ET AL.,

Appellees.

The 105th District Court, Nueces County, W. R. Blalock, Special Judge, dismissed will contest and contestants appealed. The Court of Civil Appeals, Bissett, J., held that record failed to establish that contestants accepted benefits under will so as to estop them from contesting will, that since other persons had timely commenced contest, contestants were not barred by limitations, and that under the entire record, case would be remanded for another trial.

Remanded with directions.

1. Wills (key)230

Record in will contest did not establish that objectors to probate of will were estopped from asserting invalidity of will.

2. Estoppel (key)92(1)

Where one having right to accept or reject transaction takes or retains benefits thereunder, he ordinarily ratifies transaction, is bound by it, and cannot avoid its obligation or effect by taking position inconsistent with it at later time.

3. Estoppel (key)92(1)

In order to create estoppel by acceptance of benefits it is essential that party against whom estoppel is claimed should have acted with knowledge of facts and of his rights.

4. Estoppel (key)54

Estoppel cannot be successfully asserted against person who is ignorant of facts although he acted under mistake of facts, unless his ignorance or mistake is result of negligence.

5. Estoppel (key)119

Questions making up elements of estoppel are normally questions of fact to be decided by a jury.

6. Estoppel (key)118

If judgment sustaining plea of estoppel is to be upheld solely on evidence that was admitted by party asserting estoppel, and opposite party is denied right to present his defensive evidence, evidence on behalf of party asserting estoppel must be uncontrovertible.

7. Wills (key)800

There is no basis for election where will contestant does not know, at time he accepts benefits under will, of lack of testamentary capacity of testator, and/or of undue influence and fraud practiced on testator in making of will.

8. Wills (key)324(1)

Question of whether beneficiary under will had knowledge of his rights to contest will was issue of fact for jury.

9. Wills (key)230

Executor's fees and salaries as ranch manager paid to cousin of testatrix who would have received substantially more under prior will were not benefits paid under terms of contested will and did not estop cousin from contesting will.

10. Wills (key)230

Facts that cousin joined in application for probate of contested will, voted to resist contest, and acted as executor of estate until time of his death may have probative force on practical construction placed by him on will and his rights thereunder, but did not establish estoppel to contest will as matter of law.

11. Wills (key)230

Evidence in will contest proceeding failed to establish that cousin who accepted certain benefits under will did so with full knowledge of facts surrounding execution of will so as to create estoppel against will contest.

12. Estoppel (key)3(1)

Judicial estoppel arises when party to suit alleges or admits in his pleadings in former judicial proceeding, under oath, contrary of assertion sought to be made in case then being tried.

13. Wills (key)230

Fact that executor of estate of testatrix' cousin who obtained benefits under testatrix' will filed inheritance tax returns showing that part of cousin's estate consisted of properties acquired through testatrix' valid will did not establish judicial estoppel precluding heirs of cousin from contesting testatrix' will.

14. Wills (key)324(1)

In light of record in will contest, statement by contestant's counsel to effect that question of estoppel was matter of law for court did not justify court's ruling that questions of estoppel and want of interest were questions of law.

15. Estoppel (key)110

Estoppel is affirmative defense which is required to be specifically pleaded. Rules of Civil Procedure, rule 94.

16. Estoppel (key)112, 115

No intendments are made in favor of plea of estoppel, no inferences are to be drawn from allegations constituting such plea, and it is incumbent on pleader to plead and prove all facts essential to its existence with particularity and precision. Rules of Civil Procedure, rule 94.

17. Wills (key)230

Two essential elements of estoppel to contest will because of election, are that the one who is sought to be estopped must have had knowledge of his rights and knowledge of all material facts at time he accepted benefits.

18. Wills (key)283

Pleadings in will contest by proponents of will were insufficient to constitute valid pleas of estoppel against contestants.

19. Wills (key)292

In view of inadequacy of pleadings to raise issue of estoppel to contest will, it was error for court to admit evidence concerning estoppel over contestants' objections.

20. Wills (key) 203

Entire proceedings of administration of estate of decedent from filing of application to probate will until decree probating it becomes final are proceedings in rem. V.A.T.S. Probate Code, § 2(e).

21. Wills (key) 423

Judgment probating will is not for or against any person but determines status of subject matter of proceeding, and, when it duly establishes instrument as last will of decedent, it is conclusive on everyone. V.A.T.S. Probate Code, § 2(e).

22. Wills (key) 229

Any interested party may contest judgment probating a will by instituting suit within two years after will was admitted to probate. V.A.T.S. Probate Code, § 93.

23. Limitations of Actions (key) 126

Timely institution of suit to contest will that had been admitted to probate by person who comes within statutory definition of "interested persons" precludes defense of limitations against other interested persons and contestants who would otherwise be barred. V.A.T.S. Probate Code, §§ 3(r), 93.

24. Trial (key) 3(5), 4

Question of interest vel non of contestant in will contest should be raised in limine by proponents of will, should be tried separately, and in advance of trial of issues affecting validity of will.

25. Wills (key) 288(1)

Where pleadings by will contestants were sufficient to prima facie clothe contestants with interest to contest will and proponents of will moved for summary judgment on basis that contes-

tants were estopped from contesting will by virtue of having received benefits thereunder, withdrawal of motion for summary judgment relieved contestants of any duty to go forward with any evidence concerning their interest in the estate.

26. Judgment (key) 190

Presenting motion for summary judgment which is ultimately overruled does not adequately raise question of want of interest in will contest in limine.

27. Wills (key) 358

If motion for summary judgment upholding validity of will is granted on basis contestants had no interest, judgment would be final and contestants could test it on appeal.

28. Wills (key) 292, 400

After trial on merits of will contest, it was reversible error to admit evidence on claim that contestants were estopped to contest will.

29. Wills (key) 229

Heir at law as well as beneficiary under 1948 will had standing to contest 1960 will of decedent.

30. Descent and Distribution (key) 86

Wills (key) 743

Heirs, devisees and legatees of decedent may validly assign all or any part of their rights and interests in decedent's estate to another person.

31. Wills (key) 229

Assignee of heir at law or devisee or legatee of decedent has right to prosecute will contest to set aside will which prejudicially affects rights or properties transferred by assignment.

32. Wills (key)229

Persons who were not legatees or devisees under decedent's 1960 will, who were beneficiaries under will of their father who was heir and legatee under decedent's 1948 will, and who were assignees of another heir and legatee under decedent's 1948 will could contest 1960 will because of their interest in estate inherited from their father and because of interest acquired by assignment.

33. Judgment (key)210

Trial court may not render judgment against party to lawsuit before he has had opportunity to present his evidence on disputed issues of fact. Rules of Civil Procedure, rules 262, 265.

34. Constitutional Law (key)251

Due process assures full hearing before court, commission or other tribunal, empowered to perform judicial function, and includes right to introduce evidence at meaningful time and in meaningful manner and have judicial findings based thereon. Vernon's Ann.St.Const. art. 1 § 19; U.S. C.A.Const. Amend. 14, § 1.

35. Wills (key)401

In light of entire record in will contest case, reviewing court which reversed trial court's dismissal of contest on ground contestants were estopped would remand case for another trial.

Wood, Burney, Nesbitt & Ryan, Frank W. Nesbitt, Corpus Christi, for appellants.

Kenneth Oden, Alice, Baker & Botts, Denman Moody, Jr., Houston, Dyer, Redford, Burnett, Wray & Woolsey, S. E. Dyer, Corpus Christi, Rankin, Kern & Martinez, H. H. Rankin, Jr., McAllen, William C. Wright, Laredo, for appellees.

OPINION

BISSETT, Justice.

This is an appeal from an order of the District Court of Nueces County that dismissed appellants in a contest of the will of Sarita K. East, Deceased, on the ground that they were estopped to attack the contested will. Appellants were held by the court to be estopped for want of interest in the subject matter of the suit as a matter of law. Following their dismissal, intervenor Bishop Drury was also dismissed from the case. Thereafter, the remaining parties to the litigation settled their differences, the jury was discharged, and an agreed judgment was entered. Appellants and the Bishop timely excepted to the order dismissing them, and duly perfected their appeal from the final judgment. Subsequently, the Bishop entered into an agreed settlement and the appeal as to him was dismissed. The history of the case and the events leading up to dismissal of appellant from the lawsuit follow.

Mrs. East died on February 11, 1961, at the age of seventy-one years, leaving an estate that was valued by the Internal Revenue Service at about twenty-nine million dollars.

The suit is a will contest which challenged the validity of the will of Mrs. Sarita K. East that was made by her on January 22, 1960, and four codicils thereto, henceforth referred to as the "1960 will". Mrs. East also executed a will on December 31, 1948, and a codicil thereto, hereinafter called the "1948 will".

The appellants, plaintiffs in intervention, are Patrick A. Turcotte, Robert A. Turcotte, Louis Edgar Turcotte, Jr., John W. Turcotte, Joseph A. Turcotte, Elizabeth Stella Turcotte, children of Edgar Turcotte, Deceased, and Elizabeth A. Turcotte, his surviving wife and widow. Appellants were the sole heirs at law of Edgar Turcotte, and were his only beneficiaries under his will, which was duly probated. Intervenor Patrick A. Turcotte qualified as executor of Edgar Turcotte's estate.

The appellees, who have filed briefs in this Court, are the Alice National Bank, and the John G. and Marie Stella Kenedy Memorial Foundation, defendants in the will contest; Raul Trevino, et al, the original plaintiffs, hereinafter called "plaintiffs"; Tom East, et al, plaintiffs in intervention; and Lee H. Lytton and Stella T. Lytton, defendants in intervention.

No children were born to or adopted by Mrs. East. Among her heirs at law were Edgar Turcotte, a first cousin, and Marie Walker, a second cousin. Under the 1960 will, Edgar Turcotte was given properties that were worth something over a million dollars. Under the 1948 will, Edgar Turcotte was to receive properties that were worth more than 5 million dollars. Marie Walker was a legatee under the 1948 will; she received nothing by the 1960 will. The Foundation was the residuary devisee and legatee under the 1960 will and received properties that constituted seventy-five to eighty per cent of the gross value of the estate; it was not named to receive anything under the 1948 will.

The record is voluminous. It numbers more than 18,000 pages. The briefs total 733 pages. 110 points of error are brought up by appellants. The rulings by the trial judge are vigorously assailed by appellants and steadfastly defended by appellees.

The "East Will" has been the subject of extensive litigation. There have been at least seven separate prior appeals concerning some aspects of this case.¹ At the time appellants intervened, 86 persons had entered the case as contestants of the will. At the

¹ Kimmel v. Lytton, 371 S.W.2d 927 (Tex. Civ. Appl. — Waco 1963, writ ref'd); Alice National Bank v. Edwards, 383 S.W.2d 482 (Tex. Civ. Appl. — Corpus Christi 1964, writ ref'd n. r. e.); Turcotte v. Alice National Bank, 394 S.W.2d 228 (Tex. Civ. App. — Waco 1965), reversed 402 S.W.2d 894 (Tex.); Alice Nat. Bank v. Edwards, 408 S.W.2d 307 (Tex. Civ. App. — Corpus Christi 1966, n. w. h.); Gregory v. Lytton, 422 S.W.2d 586 (Tex. Civ. App. — San Antonio 1967, writ ref'd n. r. e.); Alice National Bank v. Corpus Christi Bank & Trust, 431 S.W.2d 611 (Tex. Civ. App. — Corpus Christi 1968), affirmed 444 S.W.2d 632 (Tex.); Alice National Bank v. Trevino, 445 S.W.2d 237 (Tex. Civ. App. — Beaumont 1969, n. w. h.); Turcotte v.

time of the dismissal of appellants intervened, 86 persons had entered the case as contestants of the will. At the time of the dismissal of appellants, that number, exclusive of appellants, had increased to one hundred fifteen.

The validity of the 1960 will is not before this Court. We are concerned only with the rights of appellants to contest that will. The primary issues presented by this appeal are whether appellants are estopped to contest the will because their predecessor in title accepted substantial benefits under the will, and whether their dismissal from the suit without permitting them to present their defensive evidence on the question of estoppel constituted a denial of due process.

The 1960 will appointed as executors, Edgar Turcotte, Sr., Jacob S. Floyd and the Alice National Bank, who filed the will for probate. It was admitted to probate by the County Court of Kenedy County, Texas, on March 6, 1961. The named executors promptly qualified as such. Following the death of Edgar Turcotte on March 18, 1963, and of Jacob S. Floyd on February 26, 1964, the Alice National Bank acted as sole remaining executor.

The 1960 will was contested on July 25, 1962, when plaintiffs Raul Trevino and thirty-nine other persons, who claimed to be heirs at law of Mrs. East, filed suit to set it aside because of fraud, undue influence and lack of testamentary capacity. Thereafter, numerous other parties intervened.

Tom East Jr., Robert East and Alicia East intervened on November 15, 1962. They adopted the allegations of fraud, undue influence and lack of testamentary capacity as set out in plaintiffs' petition, and also alleged that in the year 1948, Mrs. East executed a will that was later modified by a codicil made in 1950, in which they and "Ed Turcotte and Stella Turcotte Lytton

Trevino, 467 S.W.2d 573 (Tex. Civ. App. — Corpus Christi 1971, writ ref'd n. r. e.).

were named as the principal beneficiaries therein." They offered for probate the 1948 will and codicil thereto, and prayed for an order to compel the production of the originals of said instruments. On March 18, 1963, Edgar Turcotte died.

Marie Walker and others intervened on September 30, 1963, alleging that they were heirs at law of Mrs. East. They attacked the 1960 will as being void.

On December 20, 1963, Patrick A. Turcotte, individually and as independent executor of the Estate of Edgar Turcotte, Deceased, and Robert A. Turcotte, individually, intervened as plaintiffs in intervention. They challenged the 1960 will on substantially the same grounds asserted by other contestants, and also sought probate of the 1948 will. They alleged that Edgar Turcotte was a cousin of Mrs. East and was also a principal beneficiary under the 1948 will, and that appellants were the sole heirs at law and the only beneficiaries under his will. Thereafter, Patrick A. Turcotte purchased from Marie Walker a total of 10% of her interest "in expectancy or otherwise as an heir at law or as a beneficiary under any valid will and testament of Sarita K. East, Deceased". He later assigned a portion of that interest to Robert A. Turcotte. By amended pleadings, Patrick A. Turcotte and Robert A. Turcotte sued in their original capacities and as assignees of the assigned interest.

Appellees, in reply to appellants' petition in intervention, alleged that Edgar Turcotte "during his lifetime" was mindful that he could not act as executor of the estate, accept benefits under the will and at the same time contest it, and that appellants are estopped to assert any interest adverse to the 1960 will because: (1) Edgar Turcotte made application as an executor to probate the contested will, qualified and acted as such, participated in the administration of the estate, accepted employment by the estate, received and accepted substantial benefits under the will, and went into possession of the properties devised and bequeathed to him by the will; (2) the interest acquired by Patrick A. Turcotte

and Robert A. Turcotte by assignment is an estopped interest, because the person who assigned them such interest was estopped; (3) the "three Turcotte children" (Edgar Turcotte, Jr., John W. Turcotte and Joseph A. Turcotte) are estopped because they accepted benefits under the 1960 will; and (4) Patrick A. Turcotte, in his capacity as executor of the will of Edgar Turcotte, Deceased, caused to be prepared and filed with the Comptroller of Public Accounts of the State of Texas, "a judicial instrument or document in the nature of an inheritance tax return", which stated "part of the estate of Edgar Turcotte, Deceased, consisted of properties acquired from Sarita K. East, Deceased, through her valid 1960 will and codicils thereto", which constituted a "judicial estoppel".

Appellants, in their reply to appellees' pleas of estoppel, alleged that they are interested parties under the Texas Probate Code, and denied that they were not interested parties. They specially excepted to such pleadings on the ground that they were insufficient, as a matter of law, to constitute pleas of estoppel, because, among other deficiencies, there were not allegations that Edgar Turcotte or any of appellants "who purportedly accepted benefits under the terms of the will being attacked, did so with full knowledge of their rights and of the material facts affecting them". They also alleged that the properties received by their father, Edgar Turcotte, from the East estate under the 1960 will were received by him in ignorance of the facts, circumstances and conditions surrounding the execution of the 1960 will, and in ignorance of his rights to take affirmative action establishing the invalidity thereof. They tendered a return of all of the properties received under the 1960 will.

In the district court, appellees filed a motion in limine to require appellants to prove their interest in the East estate, wherein they alleged that appellants had no interest because they were estopped to contest the 1960 will. On May 4, 1970, in the district court, prior to any hearing thereon or introduction of any

evidence by anyone in connection therewith, appellees withdrew the motion.

Appellees then presented a motion for summary judgment indirectly questioning appellants' interest and saying in effect that the appellants were estopped as a matter of law to contest this 1960 will. Appellants resisted the motion for summary judgment on the grounds that there were genuine issues of fact on the question of estoppel. The district court agreed and overruled appellees' motion for summary judgment.

Appellants levelled a number of special exceptions at appellees' reply to their petition in intervention. These exceptions challenged appellees' pleadings to the effect that they had not plead the essential elements of estoppel. The trial court entered an order on July 9, 1970, that carried the exceptions with the case "for future action of the court thereon". Appellants did not object to such order, nor did they agree to it.

Trial was before the jury and commenced on July 20, 1970, and ended nine months later. Plaintiffs began putting on their evidence attacking the validity of the 1960 will. Plaintiffs rested their case on February 3, 1971. Appellants then requested that the court consider their special exceptions (on estoppel) at that point. Appellees then told the court that such matters "will not be reached for several days". Appellees then began the introduction of evidence in an attempt to uphold the 1960 will. On February 22, 1971, appellees reached the question of estoppel. Counsel for appellants again requested that the special exceptions be taken up. The jury was retired. The special exceptions (after extensive arguments) were overruled in the early afternoon of February 23, 1971. The court then stated that appellees would be permitted to go forward with their evidence on their estoppel. Appellants' objections to the introduction of such evidence were overruled. Appellees concluded their evidence on estoppel matters in the late afternoon of February 24, 1971.

The next day, February 25, 1971, both appellees and appellants presented motions to the court. Appellees' motion was entitled "Motion to Dismiss", and appellants' motion was denominated "Motion of Patrick A. Turcotte, et al, to Overrule Defendants' Motion to Dismiss Intervenor's Contest, and in the Alternative, to Permit Intervenor to Present their Evidence Creating Issues of Fact on the Estoppel Issue". Immediately after the motions were filed, the court summarily overruled appellants' motion, without permitting the appellants to introduce any evidence thereon or thereafter. Appellees' motion to dismiss appellants from the lawsuit was then granted. The jury was brought back into the courtroom and trial was resumed as to the remaining parties. On March 18, 1971, Bishop Drury was dismissed from the law suit. On April 20, 1971, the testimony was concluded and the jury was instructed to return on May 3, 1971. The case as to all of the remaining parties was settled, the jury was discharged, and an agreed judgment was then entered on June 1, 1971.

Appellants' 110 points of error can be summarized into 5 main contentions: (1) Appellants are not estopped to contest the probate of the 1960 will because Edgar Turcotte, their predecessor in title, accepted benefits under that will; (2) Appellants are not judicially estopped to contest the probate of the 1960 will; (3) Appellees should not have been allowed to present estoppel evidence that appellants were not interested parties, because appellees failed to require appellants to prove their interest in limine; (4) Appellants Patrick A. Turcotte and Robert A. Turcotte, as assignees of a fractional interest of Marie Walker's interest, are not estopped to contest the probate of the 1960 will, because Marie Walker is not estopped; (5) Appellants should have been allowed to present their evidence refuting appellees' evidence on the question of estoppel.

After the trial court overruled appellants' objections to the introduction of evidence on estoppel, the appellees proved that the appellants received benefits under the 1960 will. This evidence

included the fact that Edgar Turcotte was devised an interest in the San Pablo Ranch, which was worth several hundred thousand dollars. He went into actual possession of the ranch in December, 1961. The livestock from this ranch was sold and his share of the money was received and accepted by him during the early part of 1962. He was paid all annuities provided for in the will until July 1, 1962. The total of the annuities paid was \$35,416.63. His debts (\$59,999.98) to Mrs. East were forgiven, as directed by the will.

The evidence further showed that Edgar Turcotte, Jr., John W. Turcotte and Joseph A. Turcotte each accepted a deed to the premises devised to them under the 1960 will. A debt in the amount of \$850.00 that was owed by John W. Turcotte to Mrs. East was forgiven.

Edgar Turcotte, as an executor of the estate, up until the contest was filed, had been paid \$50,000.00 as executor's fees. An additional sum of \$49,567.78 for such fees was tendered his estate after his death. But his executor, Patrick A. Turcotte, refused to accept the same.

Edgar Turcotte was ranch manager of the East Ranches at the time of Mrs. East's death, and continued in such capacity until his death. He was paid a salary of \$550.00 per month until January 30, 1962, when it was raised to \$10,000.00 per annum. He was paid a car allowance of \$150.00 per month. During Edgar Turcotte's tenure as an executor, he actively participated in the management and control of the estate properties; he executed numerous instruments, including, but not by way of limitation, deeds and other conveyances necessary to vest in many of the beneficiaries of the 1960 will the properties that were given them by Mrs. East; he ratified oil, gas and mineral leases; he signed grazing leases and many other contracts and documents pertaining to the estate properties. He was served with a copy of the petition filed by Raul Trevino, et al, plaintiffs in the will contest.

As one of the executors of the estate, he voted on August 9, 1962, to defend against the action filed by said plaintiffs.

It is undisputed in the record, and it is admitted by the appellants, that Edgar Turcotte received and accepted benefits under the 1960 will. However, all of such benefits were received by him prior to the time that plaintiffs filed the will contest on July 25, 1962. Edgar Turcotte did not receive any benefits from the will itself after the contest was filed.

At the conclusion of this evidence, the trial court in granting appellees' motion to dismiss appellants from the case found:

" . . . that the uncontroverted and uncontrovertible evidence conclusively shows that the matters of Estoppel and Want of Interest of 'Intervenors Patrick A. Trucotte, et al', are matters of law for the Court. . . .

* * * * *

" . . . that Louis Edgar Turcotte, Sr., Deceased, and his heirs and devisees or anyone claiming by, through or under him are, under the disputed, controlling and uncontroverted evidence adduced before this Court, estopped as a matter of law from contesting the probate . . . "

[1] Aside from the procedural errors, the defective pleadings, and the refusal of the trial court to admit defensive evidence on the question of estoppel (which we discuss later on in this opinion), the trial court was in error in dismissing appellants' suit in intervention, because the evidence did not show conclusively that appellants were estopped from contesting the probate of the 1960 will.

[2-5] The principal question in this case is that of estoppel. The purpose of estoppel is to prevent inconsistencies that would result in an injustice. It is appellees' contention that the appellants (or their predecessors) accepted benefits under the 1960 will, electing to take under such will, and by electing to take under such will are now estopped from impeaching the instrument.

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ordinarily ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent with it at a later time. In order to create an estoppel by the acceptance of benefits, however, it is essential that the party against whom the estoppel is claimed should have acted with knowledge of the facts and of his rights. It is an indispensable requisite in order to assert the doctrine of estoppel that the person claimed to be estopped shall have had the full knowledge of the full facts at the time his conduct is alleged to be related thereto, in order to constitute the basis of estoppel. Estoppel cannot be successfully asserted against a person who is ignorant of the facts or who acted under a mistake of facts, unless his ignorance or mistake is a result of negligence. Questions making up the elements of estoppel are normally questions of fact to be decided by a jury. Whether the facts are expressed or implied, they nevertheless, must be determined in the light of all the facts and circumstances. See 31 C.J.S. Estoppel §§ 70-71, 109 & 110(3); *Graser v. Graser*, 147 Tex. 404, 215 S.W.2d 867 (1948); *Jones v. Guy*, 135 Tex. 398, 143 S.W.2d 906 (1940); *Gorman v. Gause*, 56 S.W.2d 855 (Tex.Com.App.1933).

[6] Therefore, before there can be an estoppel in this case, it is essential that the party against whom the estoppel is claimed must have acted with full knowledge of the facts and of his rights under the will, and of the material facts concerning the estate. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935); 31 C.J.S. Estoppel § 109 b, pp. 561-562; 22 Tex.Jur.2d, Estoppel, § 12 p. 676. It is an indispensable requisite that where estoppel is sustained only on the evidence of the party claiming estoppel, that party must present incontrovertible evidence that the party against whom the estoppel is urged had knowledge of his rights, and of the material facts concerning the estate. If a judgment sustaining a plea of estoppel is to be upheld solely upon the evidence that was admitted by the party asserting estoppel (and

the opposite party is denied the right to present his defensive evidence thereto), that evidence must be uncontrovertible.

"Before an estoppel can arise as a matter of law, there must be certainty to every intent, and the facts alleged to constitute estoppel are not to be taken by argument or inference". *Rio Delta Land Company v. Johnson*, 475 S.W.2d 346 (Tex.Civ.App.—Corpus Christi 1971, writ ref'd n. r. e.). "Though a person may ordinarily be presumed to know his legal rights, that presumption does not apply when the issue is his intention to elect between inconsistent rights". *Martin v. Lott*, 482 S.W.2d 917 (Tex.Civ.App.—Dallas 1972 n. w. h.). In *Dunn v. Vinyard*, 251 S.W. 1043 (Tex.Com.App.1923), the principal evidence of election to take under a will was the qualifying of Mrs. Dunn (contestants' predecessor in title) as executrix of the estate, her acts in such capacity, her knowledge of the will and its contents, her expressions of satisfaction with the will, her discussions of the will with the attorney for the estate, the probating of the will and the filing of an inventory. It was there held that such acts did not establish an election as a matter of law, but constituted evidence of an intention to elect to take under the will, which should have been submitted to the jury for determination. Election was there defined:

"... an election means that a legatee or a devisee under a will is put to the choice of accepting the beneficial interest offered by the donor in lieu of some estate which he is entitled to, but which is being taken from him by the terms of the will. When by the express terms of the will the party is put to an election, he must make a choice regardless of the relative value of the two inconsistent rights ..."

It is was stated *Packard v. De Miranda*, 146 S.W. 211 (Tex.Civ.App.—San Antonio 1912 writ ref'd):

"The doctrine of election is founded upon principles of equity and justice, and upon actual intention, and an election made in ignorance of material facts is not binding, and especially, as in this case, where no other person's rights have

been affected thereby. 'So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed' ..."

In *Frazier v. Winn*, 472 S.W.2d 750 (Tex.Sup.1971), it was said:

"... there can be no ratification or estoppel from acceptance of the benefits by a person who did not have knowledge of all material facts".

It was held in *Scoby v. Sweatt*, 28 Tex. 713 (1866), what we believe is the general rule of law today, that the receipt of a legacy under the will does not estop the legatee from contesting the will where, at the time he accepted the benefits, he did not have full knowledge of his rights under the will, or of the material facts concerning the estate.

In a case where the fact situation and principles of law are strikingly similar to those presented by this appeal, the Supreme Court of Kansas, in *Weichold v. Day*, 118 Kan. 598, 236 P.649 (1925), held that a beneficiary who, without knowledge of material facts, received and accepted benefits under the will, participated in its probate, and waited more than three years before filing his petition contesting the will, was not estopped from assailing the will where he returned the benefits. On this feature of the case, the Court held:

"It is the law, of course, that a person who, without his fault and in ignorance of facts affecting the validity of a will, has accepted benefits under it, has to return those enefits or offer to account therefor before he can take the initiative to set aside the will."

The Court further held that even though conditions and circumstances existed which might have estopped the beneficiary in an action brought by him to set the will aside, that he could not be

excluded from participating in a will contest that was brought by others, because "once the bars were taken down for the adjudication of the property rights of other litigants" the adjudication would or could affect the beneficiary's rights. In such a situation, the Court pointedly observed:

"... And moreover, neither equity nor good conscience required him in this lawsuit to persist in any prior inequitable attitude he may heretofore have taken, knowingly or unwittingly, against the interests of his dead sister's children through his former participation or acquiescence in the probate of the will"

In *Carder v. Fayette County*, 16 Ohio St. 353 (1895), quoted in 72 A.L.R. 1141, where the widow's right to elect to take under a will was governed by statute, the Court held that the election to take under the will does not estop her from contesting the will or setting up her claims as an heir at law. The Court further observed that an election to take under those circumstances would render her rights uncertain and impracticable, and said:

"... If there is no valid election, and of course no estoppel or bar. And it matters not whether the invalidation takes place before or after the election, or at whose instance it takes place. It is only in the event that the probated document, becomes established as a valid will, that her election can have any effect whatever".

We also note the comments of a Texas Court, in *Smith v. Negley*, 304 S.W.2d 464 (Tex.Civ.App.—Austin 1957, n. w. h.), as follows:

"Suppose, for instance, an heir other than Mrs. Smith had contested the will from the time it was offered for probate. Certainly Mrs. Smith, under these circumstances, could and must await the outcome of that litigation before being compelled to make a binding choice to take or not take under such will."

There is substantial authority in other jurisdictions that one who has accepted benefits without full knowledge of his rights or of the facts and circumstances surrounding the execution of the will, is not thereby estopped from contesting the same.²

[7] There is no basis for an election where the contestant does not know, at the time he accepts the benefits under a will, of the lack of testamentary capacity of the testator, and/or of undue influence and fraud practiced upon such testator in the making of the will. He can not be held to have chosen between two inconsistent rights when he knew of the existence of but the one he accepted, nor to have had the intention to reject a right of whose real or potential actuality he was ignorant. Under those circumstances, he should be permitted to revoke his acceptance and tender back the benefits, and prosecute his claim either as an heir at law where there is no prior valid will, or as a beneficiary under a prior will whose existence was unknown to him at the time he accepted the benefits.

Appellees, in their brief, state that Edgar Turcotte was present at a meeting held at the Kenedy Ranch in April, 1961, "at which time evidence of undue influence and fraud upon Mrs. East was related in some detail". The volume and page of the record cited by appellees in support of their statement does not show that

² *Schmidt v. Johnston*, 154 Md. 125, 140 A. 87 (1928); *Del Vecchio v. Del Vecchio*, 146 Conn. 188, 148 A.2d 554; *In re Miller's Estate*, 166 Pa. 97, 31 A. 58; *In re Mac Vicar's Estate*, 251 Iowa 1139, 104 N.W.2d 594; *Johnson v. Ellis*, 172 Ga. 435, 158 S.E. 39; *Gates v. Gates' Executor*, 281 S.W.2d 1 (Ky. Sup.): *In re Cassidy's Estate*, 77 Ariz. 288, 270 P.2d 1079; *Kelley v. Hazzard*, 96 Ohio St. 19, 117 N.E. 182; *Stone v. Cook*, 179 Mo. 534, 78 S.W. 801; *Merrill Trust Co. v. Hartford*, 104 Me. 566, 72 A. 745; *Watson v. Watson*, 128 Mass. 152; *McClure v. Wade*, 34 Tenn. App. 154, 235 S.W.2d 835; *Hale v. Cox*, 231 Ala. 22, 163 So. 335; *In re Bremer's Estate*, 141 Neb. 251, 3 N.W.2d 411; *In re Covington's Will*, 252 N.C. 546, 114 S.E.2d 257; *Blatt v. Blatt*, 79 Colo. 57, 243 P. 1099; *Bowes v. Lambert*, 114 Ind. App. 364, 51 N.E.2d 83, 897; *Medill v. Snyder*, 61 Kan. 15, 58 P. 962; *Barnett Nat. Bank of Jacksonville v. Murrey*, 49 So.2d 535 (Fla. Sup.), 21 A.L.R. 2s 1452.

Edgar Turcotte was present at that meeting. We have found no other evidence in the record to substantiate such statement.

[8] The only evidence in the record concerning Edgar Turcotte's knowledge of his rights with respect to the 1960 will is found in the testimony of B. R. Goldapp, Trust Officer and President of the Executor, Alice National Bank, who testified that at one of the meetings of the executors of the East estate, a discussion was had between Jacob S. Floyd and Edgar Turcotte respecting Edgar Turcotte's taking properties under the 1960 will, that the later insisted on getting title "to the ranch", that Jacob S. Floyd told him "if he took title to the property, that that would bar him from any contest", and Edgar Turcotte reportedly said: "I know that". Since the Alice National Bank is an adverse party to appellants in this suit, the credibility of B. R. Goldapp is at issue, and the question of knowledge of rights on the part of Edgar Turcotte is an issue of fact for the jury, not one of law for the court. Additionally, the record does not show that Edgar Turcotte ever took title to the ranch.

There is no allegation that Edgar Turcotte ratified the 1960 will. There is no evidence that Edgar Turcotte, at the time he accepted the benefits, knew, or should have known, of the 1948 will, which gave him property that was worth more than five times the value of the property that was given to him under the contested will. The testimony of Tom East to the effect that Edgar Turcotte, at some indefinite time, told him of the 1948 will, cannot be considered for any purpose. That testimony was admitted into evidence on March 18, 1971, which was after appellants had been dismissed from the suit. This case must be decided on the record as it existed on March 1, 1971, when the order of dismissal was signed and rendered. *Stephens County v. J. N. McCammon*, 122 Tex. 148, 52 S.W.2d 53 (1932).

[9] The executor's fees and salary as ranch manager paid to Edgar Turcotte were not benefits paid to him under the terms of the contested will, but were in payment of costs of administration

and for personal services rendered the estate. Such payments do not amount to estoppel as a matter of law.

[10] The facts that Edgar Turcotte joined in the application for probate of the will under consideration, voted to resist the contest that was filed by plaintiffs, and acted as executor of the estate until the time of his death, which may have probative force upon the practical construction placed by him on such will and of his rights thereunder, do not, of themselves, establish estoppel as a matter of law. There was not evidence that Edgar Turcotte was put to an election, nor is it conclusively shown that he made such an election. In this case, rights of third parties are not involved, and the intervention by appellants in the will contest (that was filed by others) did not add to appellees' burdens already existing at the time appellants intervened. Appellees suffered no injury and were not put in a worse condition because of the claims asserted by appellants. See *Pryor v. Pendleton*, 92 Tex. 384, 47 S.W. 706 (1898), where the court says that putting the other legatees in "a worse position" is an "essential element of estoppel upon which the doctrine of election rests". See 31 C.J.S. Estoppel § 109b, Elements, Extent & Limits of Rule.

The cases cited by appellees in their brief,³ in support of their position that Edgar Turcotte made a binding election to take

³ *Miller v. Miller*, 149 Tex. 543, 235 S.W.2d 624 (1951); *Upson v. Fitzgerald*, 129 Tex. 211, 103 S.W.2d 147 (1937); *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935); *Pryor v. Pendleton*, 92 Tex. 384, 49 S.W. 212, and 47 S.W. 706 (1898, 1899); *Bumpass v. Johnson*, 285 S.W.272 (Tex.Com.App.1926); *Lieber v. Mercantile National Bank of Dallas*, 331 S.W.2d 463 (Tex.Civ.App.—Dallas 1960, writ ref'd n. r. e.); *Portis v. Cummings*, 14 Tex. 171 (1855); *Atkins v. Womble*, 300 S.W.2d 688 (Tex.Civ.App.—Dallas 1957, writ ref'd n. r. e.); *Kellner v. Blaschke*, 334 S.W.2d 315 (Tex.Civ.App.—Austin 1960, writ ref'd n. r. e.); *Von Koenneritz v. Hardcastle*, 281 S.W.2d 498 (Tex.Civ.App.—Austin 1950, writ ref'd n. r. e.); *Hardin v. Hardin*, 66 S.W.2d 362 (Tex.Civ.App.—Fort Worth 1933, n. w. h.); *Jones v. Jones*, 301 W.W.2d 310 (Tex.Civ.App.—Texarkana 1957, writ ref'd n. r. h.); *White v. Heberd*, 89 S.W.2d 482 (Tex.Civ.App.—El Paso 1936, n. w. h.); *McWhorter v. Gray*, 4 S.W.2d 302

under the 1960 will when he accepted the benefits provided for him thereunder, involve factual situations that are entirely different from the case at bar. It was held in each case that the contestant had full knowledge of his rights and of all material facts surrounding the execution of the will. In some of the cited cases, the contestant was also estopped under the doctrines of estoppel by deed and estoppel by judgment. No such situation exists here.

[11] The record does not conclusively show that at the time Edgar Turcotte accepted the benefits under the 1960 will he had knowledge of the facts surrounding the execution of the 1960 will, nor that he knew of his rights under the 1948 will. It therefore follows that neither Edgar Turcotte nor any of the appellants had, as a matter of law, the requisite knowledge to have made an intelligent election that would estop them from contesting the 1960 will. Since there are fact issues to be decided by the trier of facts concerning the elements making up the estoppel issued, we hold that the trial court was in error in dismissing these appellants. Appellants points of error in this connection are accordingly sustained.

Appellees contend that the appellants are judicially estopped from contesting the 1960 will by virtue of a document filed with the Comptroller of Public Accounts. This instrument was signed by Patrick Turcotte (one of the appellants) as executor of the Estate of Edgar Turcotte. The document was prepared or caused to be prepared by Patrick Turcotte in connection with an inheritance tax return. It was introduced into evidence by the appellees, but it does not state in any place that the estate of Edgar Turcotte consisted of properties acquired from Sarita K. East "through her valid 1960 will and codicils" as stated by appellees. Although the appellees did not plead the essential elements of

(Tex.Civ.App.—Texarkana 1928, n. w. h.); *Lancaster v. Burris*, 352 S.W.2d 136 (Tex.Civ.App.—San Antonio 1961, n. w. h.).

judicial estoppel, the judgment, in its broadest concept, could be construed as being based on this form of estoppel.

[12,13] Judicial estoppel arises when a party to a suit alleges or admits in his pleadings in a former judicial proceeding, under oath, the contrary of the assertion sought to be made in the case then being tried. *Long v. Knox*, 155 Tex. 581, 291 S. W.2d 292 (1956). No such allegations appear in appellees' pleadings. The office of the Comptroller of Public Accounts (where the affidavit was filed by Patrick A. Turcotte) is not a court. It is not vested with judicial functions. *Moorman v. Hunnicut*, 325 S.W.2d 941 (Tex.Civ.App.—Austin 1959, writ ref'd n. r. e.). Neither the pleadings nor the proof sustain a dismissal of appellants from the lawsuit on the ground of a judicial estoppel. Appellants' points of error 86 to 90 and 93 are sustained.

Appellees, in their motion to dismiss appellants from the lawsuit, stated that counsel for appellants had made a judicial admission "to the effect that the question of estoppel is a matter of law for the court and is not a question of fact for the trier of fact to determine". They argue that appellants cannot now contend that estoppel involves fact issues. The trial judge, in the order of dismissal, among other findings, found that the appellants "had during this proceeding, represented to the court that the questions of estoppel and want of interest were questions of law for the court".

On January 5, 1971, plaintiffs (Trevino's et al) who were still putting on their case, started to tender evidence relating to benefits accepted by Edgar Turcotte under the 1960 will. Counsel for appellants objected on two grounds: first, that the court had not ruled on appellants' special exceptions to defendants' pleas of estoppel; and, second, that plaintiffs had not pleaded estoppel against appellants. During the colloquy between bench and bar,

in connection with plaintiffs' offer of their evidence, counsel for appellant made the statement:

"I'd say that the question of estoppel is a matter of law for the court in view of the fact that it's an in rem proceeding and wouldn't dispose of the case one way or the other."

The trial court sustained appellants' objections on the ground that plaintiffs had not pleaded estoppel against them.

The case of *United States Fidelity & Guaranty Co. v. Carr*, 242 S.W.2d 224 (Tex.Civ.App.—San Antonio 1951, writ ref'd), lays down five rules that must apply before a statement can be held to be a judicial admission. Contained in these rules is a requirement that the statements must be deliberate, clear and unequivocal. The Court stated: "The hypothesis of mere mistake or slip of the tongue must be eliminated", and "the doctrine (of judicial admission) should be applied with caution". The rules announced in that case were again approved by the *Supreme Court* in *Griffin v. Superior Insurance Company*, 161 Tex. 195, 338 S.W.2d 415, 419 (1960).

We have carefully examined the record with particular attention to what was said, both immediately preceding and following the making of the statement, the matters before the court at that moment, and the theories then being espoused by counsel for the respective litigants. Counsel for appellant never stated that the question of "want of interest" was a matter of law. On January 5, 1971, when the statement was made, counsel for appellants was resisting the offer of evidence that was being made by plaintiffs, not by appellees. Since plaintiffs had not pleaded estoppel against appellants, the issue of estoppel, at that particular time, as between them, was a law question. When the record is reviewed in proper context and in perspective, it is evident that the statement was tied absolutely to appellants' often asserted position "my special exceptions set forth the exact reasons why they (estoppels) are matters of law and do not involve matters of fact in any respect". Counsel for appellants clearly took the position

first, that estoppel is not in the case as a matter of law because of defective pleading, and, second, if the essential elements of estoppel were properly pleaded, that the alleged estoppels involved questions of fact. There is no reason to assume that the trial court, or appellees for that matter, were misled by counsel's statements.

[14] With the record in this posture, we are compelled to hold that the statement was not a judicial admission, as asserted by appellees in their motion to dismiss appellants, and further, that it did not constitute a representation that justifies the finding that is set out in the Court's order of dismissal as a basis, in part, for the court's ruling that the questions of "estoppel and want of interest were questions of law".

[15-19] We next consider whether appellees' pleadings of estoppel are legally sufficient to constitute valid pleas thereof. Estoppel is an affirmative defense which is required by Rule 94, Texas Rules of Civil Procedure, to be specifically pleaded. No intendments are made in favor of such a plea, no inferences are to be drawn from the allegations constituting such plea, and it is incumbent on the pleader to plead and prove all facts essential to its existence with particularity and precision. *Concord Oil Co. v. Alco Oil & Gas Corp.*, 387 S.W. 2d 635 (Tex.Sup.1965); *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929 (1952); *Eggleston v. Humble Pipe Line Company*, 482 S.W.2d 909 (Tex. v. Appl. — Houston 14th Dist. 1972, writ ref'd n. r. e.); 22 TGex.Jur.2d, Estoppel, § 20, p. 691. As we have already held, two of the essential elements of an estoppel to contest a will because of an election, are that the one who is sought to be estopped must have had: (1) knowledge of his rights, and (2) knowledge of all material facts at the time he accepted the benefits. Appellees' pleadings do not contain any such allegations, and without them, their pleadings were legally insufficient to constitute valid pleas of estoppel against appellants. Accordingly, it was reversible error to overrule appellants' special exceptions leveled at appellees' failure

to plead the above elements of estoppel. *Webster v. Isbell*, 128 Tex. 626, 100 S.W.2d 350 (1937) *Golden v. Odiorne*, 112 Tex. 544, 249, S.W. 822 (Tex.Com.App.1923); *Reyes v. Smith*, 288 S.W.2d 822 (Tex.Civ.App.—Austin 1956, writ ref'd, n. r. e.); *Jernigan v. O'Brien*, 303 S.W.2d 515 (Tex.Civ. App., Austin 1957, n. w. h.). It follows, therefore, that evidence concerning estoppel was improperly admitted over appellants' objections. *National Cash Register Co. v. Wichita Frozen Food Lockers*, 172 S.W.2d 781 (Tex.Civ.App.—Fort Worth 1943), affirmed 142 Tex. 109, 176 S.W.2d 161, appellants' points of error (1) relating to overruling of these special exceptions failure of appellees to plead the aforesaid elements of estoppel, and (2) to the properly admitted evidence, are substantial.

The original plaintiffs, (Raul Trevanal) and the intervenors, Tom East, and all of whom are appellees herein, confirm by counterpoints that appellants are barred the two-year limitation provision of Section 93, Texas Probate Code, V.A. because they first intervened in the contest more than two years after the 1960 was probated.

[20,21] The entire proceedings administration of an estate of the decedent the filing of the application to probate a will until the decree probating comes final, are proceedings in ????tion 2(e), Texas probate Code, V., *Masterson v. Harris*, 107 Tex. 71??? W. 570 (1915). "An in rem judgment, such as the order which admitted the will in question to probate, is binding upon the whole world and specifically upon persons who have rights or interest in the subject matter". *Ladehoff v. Ladehoff*, 436 S.W.2d 334 (Tex. Sup. 1968). The issues in the proceedings to probate a will are the competency of the testator to make a will, and whether the instrument propounded for probate is his will. The judgment probating a will is not for or against any person, but determines the status of the subject matter of the proceeding; and, when it duly establishes the instrument as the last will of the decedent, is conclusive upon everyone. *Masterson v. Harris*, supra.

[22] The pleadings show that appellants possessed the necessary interest in the East estate that authorized their participation in the contest. See Section 3(r), Texas Probate Code, V.A.C.S. Since a probate judgment, such as the one here in question, is binding upon everyone until it is set aside by a proper order, any interested party, under Section 93 of the Code, may contest the judgment by instituting a suit within two years after the will was admitted to probate. A proper contest was filed in the instant case by interested parties within the time limited therefor when Raul Trevino, et al, challenged the validity of the contested will by institution of suit on July 25, 1962.

[23] It is firmly established in this State that the timely institution of a suit to contest a will that has been admitted to probate, by a person who comes within the statutory definition of "intrested persons", precludes the defense of limitations against other interested persons and contestants who would otherwise be barred. *Buchanan v. Davis*, 12 S.W.2d 978 (Tex. Com. App. 1929; *Buchanan v. Davis*, 43 S.W.2d 279 (Tex. Civ. App. — Waco 1931), opinion adopted by the Commission of Appeals in 60 S.W.2d 192 (1933); *Owens v. Felty*, 227 S.W.2d 379 (Tex. Civ. App. — Eastland 1950, writ ref'd); *Strasburger v. Compton*, 324 S.W.2d 951 (Tex. Civ. App. — Fort Worth 1959, writ ref'd n. r. e.); 37 Tex. Jur. 2d, Limitations of Actions § 122, pp. 283-284.

The filing of the suit by plaintiffs tolled the running of the statute of limitations with respect to the rights of these appellants to intervene in the suit. Appellants may maintain their contest even though they intervened more than two years after March 6, 1961, when the contested will was probated, and even though they would be barred by the two-year statute of limitations if they had instituted their suit in a separate action.

The *Leatherwood v. Stephens* decisions, reported in 295 S.W. 236 (Tex. Civ. App. — Waco 1927) and in 24 S.W.2d 819 (Tex. Com. App. 1930), relied upon by said appellees, are not in point on the facts relating to the bar of limitations. There, the contest

was not filed by interested persons. Here, plaintiffs were interested parties. The counterpoints asserted by plaintiffs and the East intervenors are overruled.

There is a procedural reason why the judgment of the trial court should be reversed and the cause remanded. Appellants' "want of interest," which the trial court stated was a reason for appellants' dismissal, was not properly challenged in limine.

Section 3(r) Texas Probate Code, V.A.C.S., defines interested persons to mean "heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate". See *Laros v. Hartman*, 153 Tex. 518, 260 S.W.2d 592 (1953).

Appellants maintain that appellees waived any right to assert that they were not interested persons in the East estate, because appellees failed to present their evidence with respect to appellants' lack of interest in limine, and prior to the commencement of the trial of the case on its merits.

Appellees contend that the question of appellants' lack of interest was raised by their pleas of estoppel, that this question was properly presented by their motion for summary judgment, and that having raised the issue, were entitled to present their evidence thereon after issue was joined during the trial on the merits of the case. We disagree.

Some seven months after trial on the merits of the will contest had commenced, the appellees, over appellants' proper objections, began to introduce their evidence on the estoppel issues. And this was after the plaintiffs had rested and after the appellees had spent almost three weeks in rebutting the plaintiffs' evidence on the matter pertaining to the validity of the will. At the conclusion of appellees' evidence relating thereto, appellees' evidence relating thereto, appellees presented their motion to dismiss appellants from the case. The trial court determined that appellants were conclusively estopped from maintaining their will contest and,

therefore, lacked the necessary interest to make a claim against the estate. Whereupon, the court granted appellees' motion.

[24] It has long been the rule that the question of interest vel non of a contestant in a will contest, should be raised in limine by the proponents of the will. The issue of interest should then be tried separately, and in advance of a trial of the issues affecting the validity of the will. *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294 (1960); *Chalmers v. Gumm*, 137 Tex. 467, 154 S.W.2d 640 (1941); *Newton v. Newton*, 61 Tex. 511 (1884). The burden is upon every person who opposes the probate of a will to allege, and *if required*, prove, that he has some interest in the estate of the testator; however, the proponents of the will must by *timely demand*, put contestants upon proof of the facts relating to their interest. *Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex. Com. App. 1923). *Womble v. Atkins*, *supra*. That inquiry is nonetheless a trial of the issue of interest and should be held separately and in advance of a trial of the issues affecting the validity of the will. *Womble v. Atkins*, *supra*.

[25] Prima facie, appellants' pleadings were legally sufficient to clothe them with the necessary "interest" to contest the will. Appellees admitted that Edgar Turcotte, initially, was a person interested in the East estate. But, they argue, in effect, that his interest was relinquished by his acts as an executor of the 1960 will, and by his acceptance of benefits under that will. This, they say, estopped appellants from contesting the will. Had the motion to require appellants to prove their interest been presented to the trial court in limine, appellants would have been required to put on proof "then and there", in an in limine proceeding that their interest had not been relinquished. *Fischer v. Williams*, 160 Tex. 342, 331 S.W.2d 210 (1960); *Abrams v. Ross Estate*, *supra*; *Womble v. Atkins*, *supra*. Failure of appellants to present such proof, in compliance with the demands of appellees, would have been sufficient ground for their subsequent dismissal from the merit of the will contest. *Moore v. Stark*, 118 Tex. 565, 17

S.W.2d 1037 (Tex. Com. App. 1929). The withdrawal of the motion by appellees, however, relieved appellants of any duty or obligation to go forward with any evidence concerning their interest in the estate, absent any other challenge in limine. The questions presented by appellees' motion to require appellants to prove their interest and by appellants' reply and exceptions thereto were, therefore, rendered moot.

The question of law presented by the motion for summary judgment could be determined only upon a conclusive resolution of triable facts. The overruling of the motion only had the effect of determining that there were triable fact issues with regard to appellants' interest. *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670 (1955). Immediately thereafter and at that point, the trial court should have heard the appellants' exceptions to the pleadings. Appellants' rights to contest the will were not otherwise challenged until seven months later when appellees presented their evidence on their pleas of estoppel.

[26, 27] Presenting a motion for summary judgment which is ultimately overruled does not adequately raise the question of "want of interest" in a will contest in limine. If the motion had been sustained and appellants had been dismissed from the lawsuit, then the question of appellants' interest would not only have been adequately raised but it would have been settled prior to joining issue on the merits of the suit. Such a judgment would have been final and appellants could have tested it on appeal. *Womble v. Atkins* (supra). That is not the case here. Appellees' motion for summary judgment, together with the affidavits attached thereto, asserted that Edgar Turcotte made an election (by acceptance of benefits) to take under the will, and as a result thereof, appellants were estopped to contest the will. The appellees' affidavit raised genuine issues of fact. The court considered all of the summary judgment evidence, and determined that the evidence so presented did not show conclusively that appellants were not interested parties. They were held, in

effect, to be interested parties. The motion for summary judgment did not require appellants to *prove* that they were "persons interested".

[28] In this case, appellants' interest was not effectively challenged until appellees erroneously introduced their evidence on the estopped issues pleaded by them against appellants near the end of the trial on the merits. Call it what you may, this evidence, and it alone, brought about the dismissal of appellants because of the trial court's finding that as a matter of law, they were not interested parties in the estate, and, accordingly, were estopped (for want of interest) to maintain their contest. If appellants have no interest in this litigation and "they are mere meddlesome intruders and interlopers", as alleged by appellees in their motion to dismiss appellants, the issue of appellants' interest should have been tried in advance of the trial of the issues of the validity of the will, as directed by the Supreme Court in *Womble v. Atkins*, supra, *Chalmers v. Gumm*, supra, *Newton v. Newton*; *Abrams v. Ross' Estate*, supra. Procedurally, appellees did not properly set the stage to require appellants to prove that their interest had not been lost, surrendered or relinquished by the acts of Edgar Turcotte. They, in effect, waived that right.⁴ Consequently, they did not have a right to later on challenge appellants' interest on the grounds of the alleged estoppel by introducing evidence on their pleas of estoppel after trial on merits of the suit had commenced. It was reversible error to admit such evidence at that time and under the circumstances there presented. Any other holding would require us to ignore the rules announced by our Supreme Court in the foregoing cases. Appellants' point of error 108 is sustained.

⁴ "I have announced previously, and I announce now, that we waive, or did not present a new motion in limine for proof of heirship or proof of interest. We didn't require that in this court." This statement was made by counsel for the appellees on February 3, 1971, about the time the plaintiffs rested and before appellees put on any evidence.

[29] Appellees also plead that Patrick A. Turcotte and Robert A. Turcotte, in their capacity as assignees of Marie Walker, were estopped to contest the will because Marie Walker was herself estopped. It is without dispute in the record that Marie Walker is an heir at law of Mrs. East as well as one of the beneficiaries entitled to share in a \$20,000.00 legacy bequeathed by the 1948 will. As such, she holds the necessary justiciable interest in the East estate to maintain the will contest, and did, in fact, do so.

[30, 31] It is settled law in this State that the heirs, devisees and legatees of a decedent may validly assign all or any part of their rights and interests in a decedent's estate to another person. *Morris v. Halbert*, 36 Tex. c19 (1891); *Geraghty v. Randals*, 224 S.W.2d 327 (Tex.Civ.App.—Waco 1949, n.w.h.); 20 Tex.Jur.2d, Descent and Distribution, § 33, p. 116. An assignee of an heir at law or of a devisee or legatee of a decedent has a right to prosecute a will contest to set aside a will which prejudicially affects the rights or properties transferred by the assignment. *Dickson v. Dickson*, 5 S.W.2d 744 (Tex.Com.App. 1938).

The rule is set forth in 23 Am.Jur.2d, Descent and Distribution, § 36, p. 782, as follows:

“... Estoppels, where operating against the ancestor, do not operate against his heir as to property not inherited from the ancestor but acquired from an independent source. Hence, an heir is not bound by such an estoppel with respect to property taken by purchase, or devise, or inheritance from one other than the particular ancestor”.

In *Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex.Com.App.1923), the will contestant had acquired two rights, through different sources, to maintain a will contest. He sued on the basis of both rights. The court held that he was entitled to maintain the will contest if either right be valid, saying:

“... They were not required to rely upon one or the other. If either title pleaded showed in them any interest in the

estate of Sarah Ross, in the absence of the probate of her will, they were entitled to contest such probate.

[32] Neither Patrick A. Turcotte nor Robert A. Turcotte was named as a legatee or devisee in the 1960 will. They, having accepted no benefits under Mrs. East's will, are not personally estopped from contesting the will because of any acceptance of benefits under the 1960 will. The acceptance by them of benefits under Edgar Turcotte's will does not place them in the position of having personally accepted benefits under Mrs. East's will. They had a legal right to maintain their contest because of their interest in the East estate inherited by them from their father, and also because of the interest acquired by them by purchase from Marie Walker. They plead both titles. Therefore, they were entitled to assail the 1960 will if either title pleaded showed in them any interest in the East estate. There is no evidence that Marie Walker was estopped. Appellees' allegation that Patrick A. Turcotte and Robert A. Turcotte are estopped because their assignor was estopped is not supported by proof. The issue of whether they were estopped because of Edgar Turcotte's acceptance of benefits under the 1960 will was an open question at all times material to this appeal. There is no basis for an estoppel, as a matter of law, against Patrick A. Turcotte and Robert A. Turcotte on the specific ground asserted by appellees. Appellants' points 67, 68, 69, 70, 72 and 76 are sustained.

On February 25, 1971, the appellees filed their motion to dismiss appellants' and appellants filed their motion that appellees' motion be overruled, and, in the alternative, that they be permitted to introduce evidence on the estoppel issues. Appellants' motion was overruled without allowing them to introduce any evidence. Appellees' motion was granted.

Appellants contend that such ruling was fundamentally erroneous in that it amounted to a denial of due process of law, and the resulting dismissal was a denial of due process of law. They claim that it is impossible for the trial judge to determine, as a matter of

law, what "uncontroversial facts" he was going to consider as being "uncontroverted" and "uncontrovertible" so as to form the basis of his ruling by hearing only one side of the evidence and refusing to hear the other side.

We conclude from the record that the offer of the court to appellants to present their estoppel evidence, which was made on February 24, 1971, was made at a time when appellants were under no obligation or duty under the court's previous order of proceeding to proceed with their evidence. At the time the offer was made, it was apparent that counsel for all parties, with the exception of counsel for appellees, were of opinion that appellees' pleas of estoppel were being urged against all contestants. In that case, appellants, under the existing order of July 20, 1970, were not required to present their estoppel evidence until the plaintiffs, intervenors Andrew J. Turcotte, et al, and intervenors Robert C. Putegnat, et al, had concluded their evidence thereon. Appellants insisted on that order of proceeding. Up until that time, the court had been fully ready to hear estoppel evidence from the other contestants, but upon learnings that only appellants were affected by the motion to dismiss, without *then* offering the appellants an opportunity to present their evidence, immediately announced that he would hear appellees' motion to dismiss the next morning. Counsel for appellants promptly requested the court for permission to present their estoppel evidence prior to the hearing on the motion to dismiss. That permission was denied.

[33] Rules 262 and 265, T.R.C.P., do not authorize the trial court to render a judgment against a party to a lawsuit before he has had an opportunity to present his evidence on disputed issues of fact. *Oertel v. Gulf States Abrasive Manufacturing, Inc.*, 429 S.W.2d 623 (Tex.Civ.App.—Houston 1st Dist. 1968, n.w.h.); *Gibson v. Shaver*, 434 S.W.2d 462 (Tex.Civ.App.—Tyler 1968, n.w.h.).

[34] It is fundamental that the due process clause in the Federal Constitution assures a full hearing before the court,

commission or other tribunal, empowered to perform the judicial function invoked. That includes the right to introduce evidence at a meaningful time and in a meaningful manner and have judicial findings based upon it. United States Constitution, 14th Amendment, § 1; *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Jenkins v. Mckeithen*, 395 U.S. 411, 89 S.Ct. 1843 (1969); *Baltimore & Ohio Ry. Co. v. United States*, 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed. 1209 (1936); *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1916). That rule applies to all trials and all judicial hearings of every kind and nature. The right of a litigant to present evidence in support of his case is not left to the discretion of the trial court. That right is unqualified and absolute. Texas Constitution, Article I, § 19, Vernon's Ann.St.

In the instant case, the trial judge did not base his judicial finding of estoppel on any evidence that appellants requested him to hear. He could not have done so, because he ruled and dismissed appellants from the case before the evidence was presented to him on bill of exceptions. That is made perfectly clear from the recitals in both the order of dismissal and in the judgment. Since the judgment entered in this case certifies that the trial judge refused to allow appellants to present any evidence at the hearing on the estoppel matters, and that appellants duly objected to this action, there is no necessity for a bill of exception and the judgment just be reversed. Denial of due process appears upon the face of the judgment. Appellants' points 109 and 110 are sustained.

[35] Our holdings herein might be construed to require a reversal and rendition on the procedural question of interest. See *Chalmers v. Gumm*, 137 Tex. 467, 154 S.W.2d 640 at page 643, key (3). However, appellants do not pray for rendition in this appeal. Even if they did, we believe that there are factual questions raised on the issue of interest which require a trial. It is obvious that the case was tried by appellees on the wrong

procedural theories. Therefore, it appears to us that justice of this case demands another trial. *Morrow v. Shotwell*, 477 S.W.2d 538 (Tex.Sup. 1972), and the many authorities cited therein. In remanding the case for retrial, we instruct the trial court to try all of the procedural questions including the issue of interest separately and in advance of a trial on the issues involving the validity of the will. *Womble v. Atkins*, supra, and *Chalmers v. Gumm*, supra.

We have considered all of the points and counterpoints of error. All of appellants' points of error not discussed and those that are inconsistent with this opinion are overruled. All of appellees' counterpoints and those urged by Raul Trevino, et al, Tom East, et al, and Stella T. Lytton are overruled. The judgment of the trial court dismissing appellants from the suit is reversed and the cause insofar as it affects appellants is remanded for a new trial.

(KEY)

APPENDIX S

No. 16,482

IN THE
Court of Civil Appeals
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
AT
SAN ANTONIO, TEXAS

PATRICK A. TURCOTTE, *et al.*,

Appellants.

v.

RAUL TREVINO *et al.*,

Appellees.

No. 1029.

Court of Civil Appeals of Texas,
Corpus Christi.

October 29, 1976.

Rehearing Denied Dec. 2, 1976.

On remand in will contest, 499 S.W.2d 705, the 105th District Court, Nueces County, Joe C. Wade, J., held that two persons who had purchased assignments from heirs at law of the decedent and who also were beneficiaries of a second decedent through whom they claimed an interest in the first decedent's estate were not interested parties and did not have standing to maintain will contest. The Court of Civil Appeals, Bissett, Justice, held that the contestants' ancestor had been estopped by acceptance of benefits under the will to challenge the validity of the will so that the contestants did not have standing as beneficiaries under the ancestors' will; but that the assignments from heirs at law to the

contestants were valid despite claims of barratry and fraud and did give the contestants standing to maintain the will contest.

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

1. Wills (key)288(3)

Burden is on every person who opposes the probate of a will to allege and to prove that he has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefitted or in some manner materially affected by the probate of the will of decedent.

2. Wills (key)219

Person's interest in an estate, when challenged, is to be determined first in county court sitting in probate and on appeal in the district court.

3. Wills (key)374

On appeal to the district court from probate matters which have their origin in county court, jurisdiction of the district court is appellate only and the issues which are to be tried de novo in the district court must be confined to issues which are raised by the pleadings and the evidence in the county court; district court has jurisdiction only to revise, declare void, or set aside the orders, decrees, and judgments of the county court sitting in probate; no enlargement of the issues which are tried in the probate court will be permitted in the trial in district court.

4. Wills (key)377

District court has the power to permit necessary amendments to pleadings which are filed in probate court so long as the amendments do not change the general questions raised by the pleadings in probate and the character of the proceedings in that court.

5. Estoppel (key)92(1)

In order to create an "estoppel by the acceptance of benefits," it is essential that the party against whom estoppel is claimed should have acted with knowledge of the facts and of his rights, and that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel.

See publication Words and Phrases for other judicial constructions and definitions.

6. Wills (key)377

Where the same ground of estoppel was pled in both the probate court and in the district court and where the issue in both courts was whether certain parties had an interest in the probate proceeding, no new issues were injected into the proceedings in district court merely because the facts constituting estoppel were alleged for the first time in district court so that those parties asserting estoppel were legally entitled to amend their pleadings in the district court with respect to estoppel by acceptance of benefits.

7. Wills (key)230

Fact that filing of will contest by others after their ancestor accepted benefits under will might render the benefits accepted by their ancestor conditional in the event that the will was set aside did not give rise to a new right of the ancestor to contest the will so that the doctrine which precludes an estoppel because there is no mutuality had no application.

8. Wills (key)230

Fact that benefits which one party received under will by his acceptance of those benefits would have been required to be returned in event that the will was held to be invalid did not destroy the estoppel against him to contest the will where he was

already estopped at the time that the will contest was filed; the estoppel was not destroyed when persons other than him and his devisees filed a will contest.

9. Wills (key)230

Whether beneficiary under the will, at time he accepted benefits under the will, knew that others would file a suit to contest the will at some later date was immaterial to determination of question of whether the beneficiary, by his acts and conduct, became estopped to contest the will.

10. Action (key)2

Generally, the motives which prompt a person to act are not material in determining existence of a cause of action.

11. Action (key)2

Person may exercise a legal right regardless of the motives actuating him; the fact that an act not otherwise amounting to a legal injury is done with evil intent or improper motive does not render it actionable.

12. Wills (key)229

Plan whereby two parties successfully sought to buy a percentage of interests of certain other persons in an estate was not against public policy and did not violate any law of the state so that their motives were immaterial to determination of whether they had an interest in the probate proceedings and did not prevent them from having standing to contest the will in their capacities as assignees.

13. Descent and Distribution (key)86
Wills (key)743

Heirs, devisees, and legatees of a decedent may validly assign all or any part of their rights and interests in a decedent's estate to another person.

14. Wills (key)229

Assignee of an heir, devisee, or legatee of a decedent has a legal right to maintain a will contest to set aside a will which prejudicially affects the properties assigned or conveyed to him.

15. Wills (key)229

Will contestant who has acquired rights through different sources to property owned by decedent and disposed of by will may file suit to contest the will; contestant is entitled to maintain the contest if either right is valid and is not required to rely only on one or the other.

16. Champerty and Maintenance (key)4

Generally, contract which is procured by personal solicitation in violation of the barratry statute is void as against public policy. Vernon's Ann. P.C. art. 430.

17. Wills (key)288(3)

When assignments to two persons from two others who were heirs at law of decedent and beneficiaries under a prior will were introduced into evidence, the assignees established an interest in the estate which gave them standing to contest the later will in their capacities as assignees unless it was shown that the heirs who made the assignments were estopped to contest the will at the time that the assignments were made or that the assignments were null and void; burden of such proof was on those opposing the standing of the assignees.

18. Champerty and Maintenance (key)6(1)

Evidence that two persons sought to purchase part of the interests of heirs at law of decedent and desired to do so in order to have standing to challenge will did not show that either they, or the attorney who represented them committed an act of barratry. Vernon's Ann. P.C. art. 430.

19. Champerty and Maintenance (key)6(1)

Assignments which provided that heirs at law of decedent, for consideration, had conveyed a portion of their interest to another person along with the right to bring lawsuit to cancel any legal instrument executed by the decedent did not show that there was any offer and acceptance of employment whereby the assignee agreed and was authorized to represent assignors in the prosecution in their claims and did not show barratry. Vernon's Ann. P.C. art. 430.

20. Contracts (key)153

When two constructions of an instrument are possible, preference is given to that which does not result in a violation of law.

21. Champerty and Maintenance (key)6(1)

Fact that assignee of interest of heir at law of decedent gave legal advice to the assignor prior to the execution of the assignment did not render the assignments invalid on theory of barratry. Vernon's Ann. P.C. art. 430.

22. Champerty and Maintenance (key)1

Giving of legal advice by a person who is not a lawyer is not a violation of the barratry statute. Vernon's Ann. P.C. art. 430.

23. Champerty and Maintenance (key)1

Mere hiring of a person to search for heirs at law of a decedent in order to purchase all or any of their inheritance is not prohibited or made illegal by the barratry statute. Vernon's Ann. P.C. art. 430.

24. Descent and Distribution (key)86

Even if assignee of interests of heirs at law of decedent had violated canons of ethics of the State Bar of Texas, those assignments were not thereby rendered invalid where the assignee was not an attorney.

25. Attorney and Client (key)32

Canons of Ethics of the State Bar of Texas apply only to the professional conduct of an attorney.

26. Descent and Distribution (key)86

Assignments made by heirs at law of decedent to two others did not contravene public policy of the state and were thus not void.

27. Fraud (key)50

Fraud is never presumed; presumption is in favor of the fairness of the transaction.

28. Descent and Distribution (key)86

In the absence of allegation that assignee of interests of heirs at law of decedent promised anything in the future to the heirs when purchasing the assignments knowing at the time that he had no intention to comply with such promises, there was no showing of fraud such as would render the assignments invalid.

29. Descent and Distribution (key)86

Continued assertion by two persons who purchased interests of heirs at law of decedent that they were persons interested in probate proceeding by virtue of the assignment did not constitute a use of assignments in such a way that the assignors suffered any legal harm and thus did not render the assignments invalid even though it became impossible to finally settle the entire controversy by agreement as long as the assignees remained party to the suit.

30. Contracts (key)103

Validity of any instrument is to be determined as of the time it was made and in light of the circumstances surrounding the parties at that time, not at some subsequent date.

31. Descent and Distribution (key)86

Where, at time that assignments were made by heirs at law of decedent, both the assignors and the assignees sought to challenge validity of a will, fact that, several years later, the interests of the assignors were changed by their compromising their claims did not render any representations made by the assignees at the time of the assignment false and did not show any fraud in connection with the assignment.

32. Descent and Distribution (key)86

Even though assignee of the interests of heir at law of decedent was told, at the outset of his discussions which lead to the assignment by the heir, that the heir was being represented by an attorney, the assignee was under no duty to make inquiry concerning the provisions of the contract between the attorney and the assignor.

33. Assignments (key) 126

Where attorney for assignors approved the assignments and advised the assignors to proceed, the assignors were estopped to assert the invalidity of the assignments on theory that they lacked authority to execute the assignments because of the contract with their attorney.

34. Assignments (key) 72

Where asserted representations made in connection with assignments were not contained in the written assignments, any prior understandings were merged in the written assignments and the intent of the parties was required to be ascertained solely from the assignments without the aid of extrinsic evidence.

35. Wills (key) 229

Even though consideration for assignments made by heirs at law of decedent to two persons were paid for by a check drawn on account of an estate for which one of the assignees was an executor did not show that the two assignees were not persons interested in probate of the will on theory that the interests were not actually owned by them but actually were owned by all of the beneficiaries of the other estate.

36. Descent and Distribution (key) 86

Description in assignment of the interests being conveyed by heirs at law of decedent to two other persons were, as a matter of law, sufficient.

37. Wills (key) 261

Parties seeking to oppose will were not barred by lache from prosecuting that will contest.

Dyer, Redford, Burnett, Wray & Woolsey, Corpus Christi, Perkins, David, Oden & Warburton, Alice, Baker & Botts, Hous-

ton, Rankin, Kern, Martinez & Jones, Inc., McAllen, Day & Day, Fort Worth, Downman, Jones & Granger, Houston, Walter Groce, Corpus Christi, David T. Duncan, Brownsville, Herman I. Little, Jr., Asst. Atty. Gen., Austin, Harry J. Schulz, Three Rivers, Elmore H. Borchers, Wm. C. Wright, Tom N. Goodwin and John E. Fitzgibbon, Laredo, Moises V. Vela, Harlingen, Lee H. Lytton, III, Corpus Christi, Luther H. Soules, III, Oppenheimer, Rosenberg, Kelleher & Wheatley, Inc., San Antonio, for appellees.

Frank W. Nesbitt, Wood, Burney, Nesbitt & Ryan, Corpus Christi, for appellants.

OPINION

BISSETT, Justice.

Patrick A. Turcotte and Robert A. Turcotte, two of the appellants herein, have filed a "Motion for Correction of Judgment" of this Court, wherein they correctly observe that no provision was made in the judgment of this Court, made and rendered on August 30, 1976 for a reversal of the trial court's judgment and a remand of the cause to the trial court insofar as they are concerned. Therefore, the opinion of this Court which was handed down on August 30, 1976 is withdrawn and this opinion is substituted therefor.

This is a will contest. This appeal is another installment in the "East Will Litigation", which began in the early 1960's. The controlling issue here presented is whether the appellants, Patrick A. Turcotte, Robert A. Turcotte, Louis Edgar Turcotte, Jr., John W. Turcotte, Joseph A. Turcotte, Elizabeth Stella Turcotte and Elizabeth A. Turcotte, or some of them, have such an interest in the Estate of Sarita K. East, Deceased, that will entitled them, or some of them to contest the will that was made by Sarita K. East (Mrs. East) in 1960. All of the appellants claim to have such an interest as devisees and legatees of Edgar Turcotte, Deceased.

The appellants Patrick A. Turcotte and Robert A. Turcotte also claim to be interested persons in the East Estate by virtue of assignments from Robert C. Putegnatt and Marie Walker, heirs at law of Mrs. East.

The District Court of Nueces County, Texas, by an interlocutory order made on February 25, 1971, which was incorporated in a final judgment that was signed on June 1, 1971, following a trial before a jury that commenced on June 24, 1970, dismissed these same appellants from the case then pending in that court on the ground that they were estopped as a matter of law to contest the will. Following an appeal, that judgment was reversed by this Court and the cause was remanded for a new trial insofar as it affected the appellants. *Turcotte v. Trevino*, 499 S.W.2d 705 (Tex.Civ.App. — Corpus Christi 1973, writ ref'd, n. r. e.). In the reversal and remand, the District Court was instructed to try all of the procedural questions, including the issues of appellants' interest, separately and in advance of a trial on the issues involving the validity of the will.

Pursuant to those instructions, the District Court of Nueces County, sitting without a jury, conducted such a trial on the issues of appellants' interest in the East Estate properties. Trial commenced on April 7, 1975. A final judgment was rendered on June 26, 1975, which dismissed appellants from the will contest on the ground that they "are not interested parties within the meaning of Section 93 of the 'Texas Probate Code' ". The appellants have duly perfected an appeal from that judgment.

The appellant Elizabeth A. Turcotte is the widow of Edgar Turcotte, Deceased, who died testate on March 18, 1963. All of the other appellants are children of Edgar Turcotte, and they, along with Elizabeth A. Turcotte, their mother, are the sole beneficiaries under the will of Edgar Turcotte, Deceased, which will has been probated. Patrick A. Turcotte is the Independent Executor of the Estate of Edgar Turcotte, Deceased.

The only appellees who have filed briefs in this appeal are: Alice National Bank, Independent Executor of the Estate of Sarita K. East, Deceased; the John G. and Marie Stella Kenedy Memorial Foundation; the Attorney General of Texas, Raul Trevino, et al; Lee H. Lytton, Jr. and the Estate of Stella T. Lytton, Deceased; and the Most Reverend Thomas J. Drury, Roman Catholic Bishop of the Diocese of Corpus Christi.

Mrs. Sarita K. East made a will on January 22, 1960 and later executed four codicils thereto, which we refer to as the "1960 will". She also executed a will on December 31, 1948 and a codicil thereto, which we call the "1948 will". She died on February 11, 1961.

The 1960 will, which was admitted to probate on March 6, 1961 by the County Court of Kenedy County, Texas, hereinafter referred to as the "probate court", was contested on July 25, 1962, when Raul Trevino and others, who claimed to be heirs at law of Mrs. East, filed suite to set it aside because of fraud, undue influence and lack of testamentary capacity. They will henceforth be referred to herein as "plaintiffs". Thereafter, numerous other persons intervened.

The factual background of this case and the long history of the litigation is set out in our previous opinion, *Turcotte v. Trevino*, supra, at pages 708-712. We repeat here only those essential facts, circumstances and legal principles which control the disposition of the instant appeal.

Marie Walker and Robert C. Putegnat, heirs at law of Mrs. East and beneficiaries of her 1948 will, intervened on September 30, 1963. They attacked the 1960 will as being void.

On December 20, 1963, Patrick A. Turcotte, individually and in his capacity as Independent Executor of the Estate of Edgar Turcotte, Deceased, representing the devisees and legatees of Edgar Turcotte, Deceased, and Robert A. Turcotte, individually,

intervened. They challenged the 1960 will on substantially the same grounds asserted by the plaintiffs, Raul Trevino, et al.

On December 21, 1963, and on January 20, 1964, Marie Walker and Robert C. Putegnat each executed assignments to Patrick A. Turcotte, whereby each Assignor "assigned and conveyed" to Patrick A. Turcotte a total of an undivided ten percent (10%) in and to their rights, titles and interests in and to the East Estate properties. Patrick A. Turcotte then assigned and conveyed an undivided $\frac{1}{12}$ of his interest in the properties and rights assigned to him by Walker and Putegnat to his brother, Robert A. Turcotte. All of the assignments were filed in the probate court among the papers in the cause on February 28, 1964. Following the execution and delivery of those assignments, Patrick A. Turcotte and Robert A. Turcotte, amended their pleadings whereby, Patrick A. Turcotte sued in his capacity as Independent Executor of the Estate of Edgar Turcotte, Deceased, and both he and Robert A. Turcotte sued in their capacities as assignees of interests "from legal heirs of Sarita K. East, Deceased". Contained in the pleadings filed by the appellants is an allegation "that they are interested persons under Section 93 of the Probate Code of the State of Texas".

On October 3, 1964, the Bank, the Foundation, the Bishop, the Attorney General and Lytton, filed their "First Amended Motion to Require Proof of Interest" in the probate court, wherein they required all contestants to prove in limine their respective interests in the East Estate. They alleged generally that "some of the contestants and intervenors" have accepted properties and other things of value under and pursuant to the terms of the 1960 will, and that "such parties are now estopped, judicially, equitably or otherwise, from denying the validity of such will". With respect to the appellants, it was particularly averred that Edgar Turcotte, by reason of his actions and conduct during his lifetime, "became estopped and precluded from attacking or contesting the will", and, accordingly, the appellants may not assert any interest

adversely to the will "by reason of the estoppel aforesaid", and must renounce any interest adverse to such will, whether "acquired by purchase", or otherwise.

Following a hearing on the question of interest in the probate court which commenced on October 12, 1964, that court, by an order that was signed on November 30, 1964, decreed that certain contestants, including the appellants, were interested parties in the subject matter of the lawsuit.

A trial on the merits of the will contest commenced in the probate court on June 19, 1967. Judgment was signed on March 29, 1968. That judgment set aside the previous judgment, signed on March 6, 1968 that admitted the 1960 will to probate, held that such will was procured by "undue influence", and admitted the 1948 will to probate as the Last Will and Testament of Sarita K. East, Deceased. An appeal was perfected from that judgment to the District Court of Kenedy County, Texas.

The cause was transferred from the District Court of Kenedy County to the District Court of Nueces County. All of the pleadings which had been filed in the probate court were filed in the district court on May 16, 1969. There, trial commenced on July 20, 1970. For a discussion of that trial, see *Turcotte v. Trevino*, supra.

In the instant appeal, the Bank and the Foundation filed their "Third Amended Motion to Require Proof of Interest" in the district court on March 3, 1975. Lytton and the Attorney General adopted the allegations contained in the aforesaid motion. The Bishop, by supplemental pleading that was filed on March 27, 1975, adopted "all allegations contained in all pleadings and answers heretofore filed herein, now on file herein and hereafter filed herein", but only "insofar, and only to the extent, that such allegations support the issues and defenses raised and the relief sought by this defendant in his said First Amended Motion to Require Proof of Interest." The allegations contained in the

several motions and the appellants' responses thereto will be discussed in detail later in this opinion.

The judgment that was signed on June 26, 1975, and from which this appeal emanates, in addition to dismissing appellants for lack of interest in the East Estate, expressly approved the several "settlement agreements" that were made in the years 1971 and 1973 by and between all of the parties (save and except the appellants) to the litigation, set aside the judgment of the probate court of March 29, 1968 which probated the 1948 will of Mrs. East as her Last Will and Testament, and admitted the 1960 will to probate as the Last Will and Testament of the decedent.

The district judge made and filed 64 findings of fact and 25 conclusions of law. It is impracticable to list or discuss in detail such findings and conclusions. In summary, the court found and concluded that all of the appellants were estopped to contest the 1960 will because Edgar Turcotte, from whom the appellants received an interest in the East Estate, was estopped to contest the will, and further found and concluded that the assignments were invalid and, therefore did not constitute Patrick A. Turcotte and Robert A. Turcotte "persons interested" in the East Estate.

As was the case in the prior appeal, the record in this appeal is voluminous. The appellants' brief alone comprises 710 pages.

157 points of error are brought up in this appeal. The first 124 points attack the holding by the district court that the assignments from Walker and Putegnat did not clothe Patrick A. Turcotte and Robert A. Turcotte with standing to maintain a contest to the 1960 will. The remaining 33 points challenge the holding that the appellants were not "interested persons" in the East Estate because Edgar Turcotte, their predecessor in interest, was estopped to contest the will.

The record presented by this appeal differs materially from that presented by the prior appeal. Here, the appellants were required by the appellees in a motion in limine which was filed in the

district court to prove their interest in a trial on the issue of interest; such a trial was conducted in advance of a trial on the issue of the validity of the will. In the prior appeal, the assignments from Putegnat was not involved, and the interest of the appellants was not questioned in the district court by a motion in limine, and was not effectively challenged until the appellees introduced their evidence on the estoppel issues near the end of the trial on the merits.

Some of the contentions which are made in this appeal were not made in the previous appeal, and vice versa. The type and character of the pleadings, the allegations contained therein, and the theory of the attack in this case are different in many respects from those asserted in the earlier trial in the district court (July, 1970-June, 1971). Because of the disparity in the two records, some of the statements made by this Court in the prior opinion, delivered on September 24, 1973, do not apply to this appeal. The converse is also true.

We are concerned in this appeal with the 1973 constitutional amendments relating to probate jurisdiction, or any of the new laws enacted pursuant to such amendments. We apply the law to this appeal as the law existed prior to the effective date of the amendments.

Appellants content, in points 125-129, 131, 132, 135 and 136, that since the appellees did not plead in the probate court: 1) that Edgar Turcotte, at the time he accepted the benefits, had full knowledge of his rights and the material facts affecting the benefits; 2) that he had full knowledge of the fraud and undue influence facts upon which the will contest was predicated; 3) that he had full knowledge of the facts surrounding the execution of the 1960 will, and of his rights thereunder; and, 4) that he had full knowledge of the existence of the 1948 will, and of his rights thereunder, that the district court was without jurisdiction to hear and determine those matters on appeal, and that it was reversible

error for the court to overrule appellants' plea to the jurisdiction and their special exceptions. We disagree.

By statutory provision, the category of "persons interested" in an estate includes heirs, devisees, spouses, creditors, and all other persons who have a property right in or a claim against the estate. Tex.Prob.Code Ann. § 3(r). The words "persons interested", as used in the statute, have been construed to mean a person, who, either absolutely or contingently, is entitled to share in the estate. *Pena YVidaurre's Estate v. Bruni*, 156 S.W. 315 (Tex.Civ.App. — San Antonio 1913, writ ref'd); *Alexander v. State*, 115 S.W.2d 1122 (Tex.Civ.App. — Amarillo 1938, writ ref'd). The courts have enlarged such category to include assignees of heirs, devisees or legatees of the decedent whose estate is being administered. See 61 Tex.Jur.2d, Wills § 324, and the cases therein cited.

[1] The burden is upon every person who opposes the probate of a will to allege, and if required, to prove, that he has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefitted, or in some manner materially affected by the probate of the will of the decedent. *Logan v. Thomason*, 146 Tex. 37, 202 S.W.2d 212 (1947).

[2] It is settled law in this State that a person's interest in an estate, when challenged, is to be determined first in the county court sitting in probate, and on appeal in the district court. *Atkins v. Womble*, 300 S.W.2d 688, 701-702 (Tex.Civ.App. — Dallas 1957, writ ref'd n. r. e.); *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294 (1960).

[3, 4] It is also a well established rule that on appeal to the district court from probate matters which have their origin in the county court, the jurisdiction of the district court is appellate only, and the issues which are to be tried de novo in the district court must be confined to the issues that are raised by the pleadings and the evidence in the county court, as the district court has only

jurisdiction to revise, declare void or set aside the orders, decrees and judgments of the county court sitting in probate, and no enlargement of the issues that are tried in the probate court will be permitted in the trial in the district court. *Pierce, et al. v. Foreign Mission Board of Southern Baptist Convention et al*, 235 S.W. 552 (Tex.Comm'n App., 1921, opinion adopted); *Olds v. Traylor*, 180 S.W.2d 511, 518 (Tex.Civ.App. — Waco 1944, writ ref'd); *Mills v. Baird*, 147 S.W.2d 312 (Tex.Civ.App. — Austin 1941, writ ref'd); *Jones v. Jones*, 301 S.W.2d 310 (Tex.Civ.App. — Texarkana 1957, writ ref'd, n. r. e.); *In re Martin's Estate*, 284 S.W.2d 279 (Tex.Civ. App. — El Paso 1955, writ ref'd, n. r. e.); *Chesney v. Chesney*, 270 S.W.2d 464 (Tex.Civ.App. — Dallas 1954, writ ref'd, n. r. e.); *Carr v. Froelich*, 220 S.W. 137 (Tex.Civ.App. — Amarillo 1920, writ ref'd). However, it is a further well-settled rule that the district court has the power to permit necessary amendments to pleadings which were filed in the probate court so long as the amendments do not change the general question raised by the pleadings in the probate court or the character of the proceedings had in that court. *Drew v. Jarvis*, 110 Tex. 136, 216 S.W. 618 (1919); *Saros v. Strickland*, 148 S.W.2d 865 (Tex.Civ.App. — Dallas, 1941, writ dismiss'd, judg.corr.)

[5] The elements which constitute "Estoppel by Acceptance of Benefits" are as follows:

"In order to create an estoppel by the acceptance of benefits, it is essential that the party against whom the estoppel is claimed should have acted with knowledge of the facts and of his rights, and that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel..." 31 C.J.S. Estoppel § 109b, p. 561.

None of the appellees in their motions to require appellants to prove their interest in the probate court, alleged any element of estoppel to asset interest because of the acceptance of benefits

under the 1960 will by Edgar Turcotte. The Bank, the Foundation, the Attorney General, and Lytton did, however, by amended pleadings in the district court, allege all of essential elements of such an estoppel. In that amended pleading, their "Third Amended Motion to Require Proof of Interest", as grounds for the asserted estoppel because of the acceptance of benefits by Edgar Turcotte, it was alleged (and found by the court): that Edgar Turcotte accepted and retained substantial benefits under the 1960 will in "at least the amount of \$1,344,726.06"; that at the time he accepted such benefits, he acted with knowledge of his rights under the 1960 will, with knowledge of the facts surrounding the execution of the 1960 will, and with knowledge of the material facts affecting the estate; and that at the time he accepted such benefits, he knew, or should have known, of the assertions, claims and conclusions of undue influence and fraud practiced upon Mrs. East.

It was further alleged (and found by the court) that the appellants, "by reason of standing in their predecessor's shoes", have "relinquished and surrendered" all interest in the East Estate, and they are not "interested persons" in the estate, and "have no right to maintain this will contest."

The appellants, in their Reply to the aforesaid "Third Amended Motion to Require Proof of Interest", by a plea to the jurisdiction of the district court to consider such matters and by special exceptions, challenged all of the aforesaid allegations constituting estoppel except the allegations that Edgar Turcotte qualified and acted as Executor of the 1960 will, accepted benefits under the will, defended against the action filed by plaintiffs on July 25, 1962, and went into possession of the properties devised and bequeathed to him by the 1960 will. Appellants pled:

"... that such issues so created by said allegations were not created by defendants' pleadings in the probate court, and therefore, such issues may not be raised for the first time in this District Court on appeal because this Honorable

Court is without jurisdiction to hear or determine issues not created by the pleadings filed in the probate court".

The plea to the jurisdiction and the special exceptions were overruled.

[6] The same *ground* of estoppel was pled in both the probate court and in the district court. The *issue* in both courts was interest. It was recognized by the appellees that Edgar Turcotte, initially, had a sufficient interest to maintain a will contest, but they pled that this "interest" became a "relinquished interest" because of his acts and conduct in his lifetime, and that all of the appellants were estopped to challenge the 1960 will in their capacities as beneficiaries under the will of Edgar Turcotte, their predecessor in interest. That pleading in the probate court alleged an affirmative defense to the appellants' pleading that they were interested parties in the estate. That pleading was one of estoppel. The plea of estoppel was greatly expanded in the "Third Amended Motion to Require Proof of Interest", which was filed in the district court. There, all of the essential elements of "an estoppel by the acceptance of benefits" against Edgar Turcotte were alleged. Even though new facts constituting estoppel were alleged for the first time in the district court, such allegations did not inject a new issue into the proceedings, did not enlarge the ground of estoppel that was raised in the probate court, and did not change the character of the proceedings had in the probate court. We hold that the Bank, the Foundation, the Attorney General and Lytton were legally entitled to amend their pleadings in the district court with respect to an estoppel because of the "acceptance of benefits" in the manner that they did so amend. Points 125-129, 131, 132, 135 and 136 are overruled.

The appellants, in points 153 through 157, assert that as a will contest is a proceeding in rem, and since an adjudication of property rights in the will contest that was filed by others would, or could, affect the rights of Edgar Turcotte, that neither Edgar Turcotte nor his devisees were any longer bound by his accept-

ance of benefits under the 1960 will, because: 1) there was no longer any mutuality in the estoppel asserted against him and his privies; 2) the filing of the will contest by others so changed the circumstances that it would be prejudicial and inequitable to enforce an estoppel against Edgar Turcotte and his privies; 3) there is neither pleading nor proof that Edgar Turcotte, at the time he accepted benefits under the 1960 will, knew that the will contest would be thereafter filed by other persons; 4) Edgar Turcotte, upon the filing of the will contest by others, became vested with the legal right to participate in any benefits resulting from the successful prosecution thereof, and, 5) that under the facts and circumstances existing, a denial of appellants' rights to prosecute and maintain the will contest that was initially instituted by others would violate due process of law by vesting in Edgar Turcotte and the appellants a right without a remedy.

[7, 8] The doctrine which precludes an estoppel because there is no mutuality has no application to this case. The fact that the filing of the will contest by others after Edgar Turcotte accepted benefits under the 1960 will might render the benefits so accepted by him conditional in the event the will was set aside, did not, of itself, give rise to a new right of Edgar Turcotte to contest the will if he, at the time the will contest was filed by others, was then estopped from contesting the will. The further fact that the benefits which Edgar Turcotte received by his acceptance thereof would have to be returned in the event the 1960 will was held to be invalid does not destroy an estoppel against him to contest the will if he was already estopped at the time the will contest was filed. The estoppel against Edgar Turcotte, which existed at the time the will contest was instituted by the plaintiffs (Raul Trevino, et al), was not destroyed when the will contest was filed by others on July 25, 1962. Points 153 through 157 are overruled.

The appellants, in points 133, 134 and 146, complain of the court's findings that at the time Edgar Turcotte accepted benefits under the contested will he had full knowledge of his rights and

the material facts affecting them, because there is no pleading in any court that Edgar Turcotte then knew that this will contest would thereafter be filed by others, such knowledge being a material fact which, as a matter of law, is essential to support an estoppel against Edgar Turcotte, and, therefore, "the district court was without jurisdiction to hear or determine such material issue on appeal".

In points 147 and 148, it is asserted that the court erred in finding that at the time Edgar Turcotte accepted the benefits he had full knowledge of his rights and the material facts affecting them because there is "no evidence" and the evidence is "insufficient as a matter of law" to establish that he then knew that this will contest would be thereafter filed by others.

[9] Whether Edgar Turcotte, at the time he accepted the benefits under the 1960 will, knew that others would file a suit to contest the will at some later date is immaterial to whether he, by his acts and conduct during his lifetime, became estopped to contest the 1960 will. Points 133, 134 and 146, 147 and 148 are overruled.

There is neither pleading nor evidence to support the findings that Edgar Turcotte, at the time he accepted benefits under the contested will, had full knowledge of the lack of testamentary capacity of Mrs. East when she executed the will. Appellants' points 130, 141-145 are sustained.

In the prior appeal, we held that the intervention by the appellants did not add to the appellees' burdens in existence at that time, and that the appellees were not put in a worse condition because of the intervention by the appellants. The evidence on that point is the same in this appeal as it was in the former appeal. Nothing new or different in that respect is here presented. No reason has been advanced and no proof has been made that will support a different holding. The fact that the original defendants, the plaintiffs and all of the intervenors, save and except the

appellants, then in the case, settled their differences, is of no importance in determining the issue of appellants' interest in the East Estate. There is no evidence that the intervention by the appellants caused any harm, damage, injury, prejudice or injustice to any of the appellees. Points 139, 140, 151 and 152 are sustained.

Appellees, in their "Third Motion to Require Proof of Interest", also alleged (and the court found) that Patrick A. Turcotte, at the time he filed his petition in intervention on December 20, 1963, "knew that Edgar Turcotte was estopped to contest the 1960 will and that such estoppel was binding upon intervenors as his successors in interest"; that he "devised a fraudulent scheme and design to circumvent the applicable rule of law in the State of Texas"; that he obtained the assignments for the sole and only purpose of circumventing the equitable doctrine of estoppel which procluded him, as a devisee of Edgar Turcotte, who accepted benefits under the 1960 will, from contesting the will; that as a result, neither Patrick A. Turcotte nor Robert A. Turcotte have standing as "interested parties" to contest the will "by virtue of these assignments"; and, "notwithstanding the validity or invalidity of these assignments, Patrick A. Turcotte and his assigns are estopped to deny the validity of the will".

It is undisputed that Patrick A. Turcotte, prior to the commencement of any negotiations with Putegnat and Walker, contacted several attorneys in connections with his proposed contest of the 1960 will. He was advised by most, if not all, that in their opinion, Edgar Turcotte would have been estopped to contest the will. It is also undisputed that Patrick A. Turcotte, upon the advice of his attorney, Jack Cook, formulated a plan whereby he would attempt to purchase interests from heirs at law of Mrs. East for the express purpose of obtaining an additional right to assert that he was a "person interested" in the estate.

[10, 11] The general rule is that the motives which prompt a person to act are not material in determining the existence of a

cause of action. Accordingly, a person may exercise a legal right regardless of the motives actuating him, and the fact that an act not otherwise amounting to a legal injury is done with evil intent or improper motive does not render it actionable. *Magnolia Petroleum Co. v. Dubois*, 81 S.W.2d 157 (Tex.Civ.App. — Austin 1935, writ ref'd); 1 Tex.Jur.2d 521, Actions § 14; 6A C.J.S. Assignments § 59; 6 Am.Jur.2d, Assignments § 4.

[12] It is immaterial what the motives were that caused Patrick A. Turcotte to seek out Putegant and Walker and to buy a percentage of their interests in the East Estate. The plan was not illegal as being against public policy; it did not constitute a violation of any law of this State; it did not prevent Patrick A. Turcotte and Robert A. Turcotte from having standing to contest the will in their capacities as assignees of the assigned interests. Points 22 and 23 are sustained.

The court, among other findings of fact, found: 1) "Patrick A. Turcotte solicited employment by Robert C. Putegnat for Patrick A. Turcotte to represent the interest of Robert C. Putegnat in the Estate of Sarita K. East, Deceased, whereby Patrick A. Turcotte would furnish a lawyer and receive 5% of any recovery effected by Patrick A. Turcotte"; 2) and "Patrick A. Turcotte hired Robert C. Putegnat to hunt other persons who were both heirs of Sarita K. East, Deceased, and legatees or devisees under the 1948 will, and to acquire from them assignments of their interests in and to the Estate of Sarita K. East, Deceased".

Based on the foregoing findings of fact, the court concluded:

"The acts of Patrick A. Turcotte and Robert A. Turcotte and their attorney, Jack Cook, in acquiring such purported assignments from Robert C. Putegnat and Marie Walker were champertous, barratrous and illegal, and accordingly, and as a result thereof, such purported assignments were null and void and of no force or effect."

The appellants, by "no evidence" points, challenge the findings and conclusions that Patrick A. Turcotte committed barratry in

the obtaining of the assignments. We treat the points which assert that the evidence is "insufficient as a matter of law" as "no evidence" points. In addition to the "no evidence" points (8, 9, 10 and 11), the appellants' points 12 to 21 are germane to their contention that none of the assignments are null and void by reason of: 1) barratry, or 2) violations of the Canons of Ethics of the State Bar of Texas. All points are grouped for purposes of discussion and disposition.

[13, 14] It is settled law in this State that the heirs, devisees and legatees of a decedent may validly assign all or any part of their rights and interests in a decedent's estate to another person. *Morris v. Halbert*, 36 Tex. 19 (1871); *Geraghty v. Randals*, 224 S.W.2d 327 (Tex.Civ.App. — Waco 1949, no writ); 20 Tex.Jur.2d, Descent and Distribution, § 33. An assignee of an heir at law, devisee or legatee of a decedent has a legal right to maintain a will contest to set aside a will which prejudicially affects the properties assigned or conveyed to him by the assignment under which he claims. *Dickson v. Dickson*, 5 S.W.2d 744 (Tex. Comm'n App.1928).

[15] A will contestant who has acquired rights through different sources to property owned by the decedent and disposed of by will may file a suit to contest a will. Such contestant is entitled to maintain the will contest if either right be valid, and he is not required to rely upon one or the other. *Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex. Comm'n App.1923); *Turcotte v. Trevino*, supra.

The rule is set forth in 23 Am.Jur.2d, Descent and Distribution, § 36, p. 782, as follows:

"... Estoppels, where operating against the ancestor, do not operate against his heir as to property not inherited from the ancestor, but acquired from an independent source. Hence an heir is not bound by such an estoppel with respect to property taken by purchase, or devise, or inheritance, from one other than the particular ancestor".

[16] Article 430, Penal Code of Texas, the barratry statute which was in force at all times pertinent to this appeal, insofar as this appeal is concerned, made it illegal for a person to seek through solicitation employment to prosecute, defend or collect any claim, or to procure another to solicit for him employment in such claim. Generally speaking, a contract which is procured by personal solicitation in violation of the barratry statute is void as against public policy. *Pelton v. McClaren Rubber Co.*, 120 S.W.2d 516 (Tex.Civ.App. — Waco 1938, writ ref'd).

It is without dispute in the record that both Walker and Putegnat were heirs at law of Mrs. East and were beneficiaries under her 1948 will. They received nothing under the 1960 will. Each held the requisite interest in the East Estate to challenge the validity of the 1960 will, and, in fact, did so.

Walker and Putegnat each had a legal right to assign an undivided interest in their respective interests in the East Estate, and did so. Patrick A. Turcotte, who was not named in the 1960 will as a beneficiary and who received nothing under that will, and accepted no benefits under the same, even though he received an interest in properties owned by the East Estate through the will of Edgar Turcotte, Deceased, his father, had a legal right to purchase a percentage of the interest, if any, owned by Walker and by Putegnat in the East Estate, and did so. The assignments, if valid, afforded Patrick A. Turcotte and Robert A. Turcotte an additional right to maintain their will contest, which right is completely independent of their right to challenge the will in their capacities as devisees under the will of Edgar Turcotte, Deceased. They had standing to contest the 1960 will "if either title pleaded showed in them any interest in the East estate". *Turcotte v. Trevino*, supra, at page 722.

[17] Each assignment is valid on its face. "As long as the instruments remain in effect the rights of the parties have been determined". *Franke v. Cheatham*, 157 Tex. 397, 303 S.W.2d 355 (1957). When the assignments were introduced in evidence,

Patrick A. Turcotte and Robert A. Turcotte established an interest in the East Estate that gave them standing to contest the will in their capacities as assignees of heirs at law of Mrs. East. In order to destroy that right, appellees were required to show that the assignors, under whom the assignees claim, were estopped to contest the will at the time the assignments were made, or that the assignments were null and void. It was not the burden of Patrick A. Turcotte and Robert A. Turcotte to prove that none of the assignments were invalid.

On December 21, 1963, Patrick A. Turcotte, Robert A. Turcotte and Jack Cook, their attorney, met with Putegnatt in Brownsville, Texas. The only evidence that bears on the matter of barratry is found in the testimony of Putegnatt. The relevant portions of his testimony are:

"Q. Well, after you said some 'hellos' or whatever you said, did they announce the purpose for which they came?

A. Well, Pat mentioned that he would like to represent me as an individual, not as a lawyer, but for five per cent of what I would recover.

Q. Was it your claim in this suit that you're talking about?

A. Yes sir."

* * * * *

"Q. All right. What did you tell him?

A. I'd sure like to have done that, but I had a lawyer and couldn't do it."

* * * * *

"Q. And then after you learned that he could not represent you because you already had a lawyer, what did he have to say next?

A. Well, he showed me some copies of some instruments that were in a briefcase, and well, I couldn't tell much from it, but then he talked, about buying a percentage, and he's like to buy five percent for a thousand dollars.

Q. What was said later about hiring you?

A. Well, we were in conversation and he hired me.

Q. To do what?

A. To buy interests from other relatives for a certain percent."

Thereafter, and on the same day, Patrick A. Turcotte told Putegnat, according to Putegnat, that "he'd like to buy five percent for a thousand dollars". Putegnat said that they "came to terms for a thousand dollars". Putegnat then called Walker, his sister, and asked her if she was interested in selling a portion of her interest in the estate. She indicated that she was so interested. The Turcottes and Putegnat then met with Walker.

Walker testified that on December 21, 1973, Robert Putegnat, her brother, telephoned her and told her that the Turcottes "would like to buy a percentage of our interest in the Estate"; and, "he asked me if I would like to sell a percentage of mine, five percent?" She agreed to sell five percent of her interest for a thousand dollars.

Putegnat and Walker were then each paid \$1,000.00 by a check drawn on the Edgar Turcotte Estate Account, and by \$10.00 in cash. Patrick A. Turcotte, according to Putegnat's testimony, paid him (Putegnat) \$400.00 as a commission for his services, \$200.00 for his own assignment and \$200.00 for Walker's assignment.

Putegnat further testified that he was in need of money, about January 19, 1964. He contacted Walker. Both agreed that each would sell another five percent of their respective interests to Patrick A. Turcotte. Putegnat telephoned Moises Vela, his attorney, and reported: "I had already sold five percent for a thousand dollars, and would it be all right to sell another five percent." Vela replied: "it will be all right".

Walker further testified that Putegnat called her sometime in January, 1964, and asked her if she was interested in selling

another five percent to Patrick A. Turcotte. She said that she then called Mr. Vela, her attorney, and advised him of her desire to sell an interest in the East Estate to Patrick A. Turcotte.

He asked:

"Well, what do they want it for?"

She replied:

"It's just a percentage of my interest in the estate."

Vela then told her:

"Well, I don't think it could do any harm if that's what it is for . . . yeah, go ahead."

Following the telephone conversations between Putegnat and Walker relating to the sale of an additional five percent each, and after they had contacted their attorney (the same attorney who had filed their petition in intervention for them on September 30, 1963), Putegnat telephoned Patrick A. Turcotte, who came to Brownsville, and, according to Putegnat, "we sold them an extra five percent." When Putegnat was asked:

"Now, on the second occasion did Mr. Pat Turcotte again ask to represent you?";

he replied:

"No, sir."

Putegnat also testified that at the first meeting on December 21, 1963, that the Turcottes' attorney, Jack Cook, excused himself and went out into the yard immediately after Patrick A. Turcotte was told that he (Putegnat) was then represented by an attorney.

Following the meeting in January 1964, Putegnat and Walker each signed an assignment that conveyed five percent of their interest in the East Estate to Patrick A. Turcotte. The assignments are each dated January 20, 1964, and were acknowledged on the same day. Each assignor was again paid by a check drawn

on the Edgar Turcotte Estate Account in the sum of \$1,000.000 and by \$10.00 in cash. Walker and Putegnat both testified that Patrick A. Turcotte handed Putegnat four one-hundred dollar bills, which Putegnat said constituted his commissions for obtaining the two assignments.

[18] There is no evidence that Robert A. Turcotte or Jack Cook committed an act of barratry. The court erred in concluding that they did. There is no evidence to support the finding that the negotiations between Patrick A. Turcotte commenced on December 20, 1963 (the day that the petition in intervention was filed by the appellants). It is conclusively shown that such negotiations did not commence until December 21, 1963.

Since the legal effect of the assignments is of such vital importance to this case, we quote the identical language that is found in each instrument, to-wit:

"THAT I . . . , being an heir at law of Mrs. Sarita Kenedy East, Deceased, for and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable considerations to me in hand paid by Patrick A. Turcotte, the receipt and sufficiency of which is hereby acknowledged and confessed, have bargained, sold, granted, transferred, assigned, and conveyed, and by these presents do bargain, sell, grant, transfer, assign, and convey unto the said Patrick A. Turcotte, and to his heirs, executors, administrators, and assigns, an undivided Five Percent (5%) of all my rights, titles, and interests in and to all real and personal property of every nature and kind whatsoever, now or hereafter belonging to Sarita K. East, Deceased, and/or comprising any part of the Estate of said Sarita K. East, Deceased, to which I am, or may be entitled in expectancy or otherwise as an heir at law or as beneficiary under any valid Will and Testament of Sarita K. East, Deceased, including all choses in action, rights to bring lawsuits to cancel, annul, avoid, and/or set aside any legal instrument or other document executed by the said Sarita K. East during her lifetime, intending hereby to convey, transfer, assign, bargain, and sell unto the said Patrick A. Turcotte, his heirs and assigns, the right to take

any and all types of action which I could take, just as though the said Patrick A. Turcotte, his heirs and assigns, were standing in my shoes."

[19, 20] There is no language in any of the assignments which will support a finding that it constituted an offer and acceptance of employment whereby Patrick A. Turcotte agreed and was authorized to represent either Putegnat or Walker in the prosecution of their claims, as asserted by some of the appellees. The clear language of the assignments unmistakably shows that it was the intention of the assignors to sell, assign and convey, unto the assignee, an undivided percentage in all property, real and personal, belonging to the East Estate in which they owned a present interest or an interest in expectancy. There is no language in any of the assignments that will support a contention that any such language constitutes a barratrous solicitation. Moreover, when two constructions of an instrument are possible, preference is given to that which does not result in the violation of law. *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (1947).

An analysis of the events that occurred on December 21, 1963 reveals that there were three separate and distinct discussions between Patrick A. Turcotte and Putegnat on that day. They occurred in the sequence hereinafter set out. First, Putegnat testified that Patrick A. Turcotte offered to represent him in the litigation for 5% of any recovery; that offer constituted a violation of Art. 430, V.A.P.C.; however, Putegnat rejected that offer immediately after it was made, and nothing ever came of it. Second, Patrick A. Turcotte then offered to purchase five percent of Putegnat's interest in the estate properties; that offer was accepted. Third, Patrick A. Turcotte, after his offer to purchase had been accepted, offered to hire Putegnat to hunt for other "relatives" who might be interested in selling him a percentage of their interest in the estate properties; that offer was accepted. There is no evidence that any of the assignments here involved were obtained pursuant to the solicitation of Patrick A. Turcotte

that Putegnat hire him to represent him in his suit to declare the 1960 will invalid.

In order for Patrick A. Turcotte and Robert A. Turcotte to establish that they were "persons interested" in the East Estate, which would give them standing to maintain their will contest, all that was required was that they prove that at least *one* of the four assignments was valid. They met that burden.

We need not decide whether or not the December 21, 1963 assignments were obtained as a result of barratrous conduct, since that determination is not essential to the disposition of this case. Irrespective of whether those assignments were obtained through barratry, the evidence conclusively shows that the January 20, 1964 assignments were not obtained by Patrick A. Turcotte, as a result, directly or indirectly, of any illegal act. Those assignments were suggested and negotiated solely at the instance of Putegnat and Walker. They initiated the negotiations for the sale. Patrick A. Turcotte did not solicit employment with respect to the execution and delivery of those assignments. The solicitation by Patrick A. Turcotte on December 21, 1963 to represent Putegnat had no bearing on the voluntary offer of sale made by Putegnat and Walker to Patrick A. Turcotte on January 20, 1964. There is no evidence that the acts of Patrick A. Turcotte in acquiring those particular assignments "were champertous, barratrous and illegal", as concluded and held by the court.

[21, 22] The contention that all of the assignments are invalid because Patrick A. Turcotte, prior to the execution of the first assignment by Putegnat, gave Putegnat legal advice is not well founded. The giving of legal advice by a person who is not a lawyer, even if that were done, is not a violation of the barratry act.

[23] The mere hiring of a person to search for heirs at law of a decedent in order to purchase all or any of their interest in the estate of the decedent, is not prohibited or made illegal by the barratry statute. We have not been cited to a Texas case, nor

have we found a case, that makes it unlawful to hire a person to search for heirs and obtain assignments of a portion of their interest in the decedent's estate from them, irrespective of the motives for such activity.

[24, 25] There is no merit to the claim of some of the appellees that the assignments are invalid because Patrick A. Turcotte violated the Canons of Ethics of the State Bar of Texas. Patrick A. Turcotte was not a lawyer at any of the times in question. The Canons of Ethics apply only to the professional conduct of a lawyer. Patrick A. Turcotte was not bound thereby.

[26] There is no evidence that the assignments of January 20, 1964 were obtained as a result of any illegal conduct by Patrick A. Turcotte, nor is there any evidence that they were obtained in violation of the Canons of Ethics. The assignments do not contravene the public policy of this State. There is no basis for the conclusion and holding by the court that those assignments "null and void and of no force or effect". Points 8 through 21 are sustained.

Putegnatt and Walker, in their motion to require Patrick A. Turcotte and Robert A. Turcotte to prove their interest, and the Bank, the Foundation, the Attorney General and Lytton, in their "Third Amended Motion to Require Proof of Interest", further alleged, in substance, (and the court found): 1) prior to the execution of the assignments to Patrick A. Turcotte, Putegnatt and Walker employed Moises V. Vela as their attorney in the East Will suit and vested in him exclusive authority to control their cause of action, and, consequently, the assignors were without authority to assign any right to contest the 1960 will; 2) the assignments to Patrick A. Turcotte were executed and delivered subject to the condition that they would never be used to adversely affect the interest of Walker and Putegnatt, which condition "has been broken, rendering these assignments of no force and effect and void"; 3) the "obtaining of the assignments" and the use thereof "against the interest of said assignors,

amounted to a fraud practiced by said assignees against said assignors".

The appellants excepted to the allegations of fraud contained in the aforesaid motions to require the appellants to prove their interest on the ground that none of the facts necessary to constitute actionable fraud were alleged. The exceptions were overruled.

Points 34 through 49 relate to the asserted error of the court in holding that the assignments "did not convey to Intervenor Patrick A. Turcotte, et al, a sufficient interest to authorize them, or either of them, to maintain a contest of the probate of the '1960 will' ", because the assignments "are tainted with fraud and there was fraud in the inducement of such assignments". Points 27 through 33 attack the holding by the court that the assignments are unenforceable and were ineffective to furnish a basis of standing to contest the 1960 will, because of the breach of the condition of delivery.

[27, 28] Fraud is never presumed, and it has long been the rule that until all of the elements constituting fraud are alleged (and proved), the presumption is in favor of the fairness of the transaction. *Turner v. Lambeth*, 2 Tex. 365 (1847); *Hawkins v. Campbell*, 226 S.W.2d 891 (Tex.Civ.App. — San Antonio 1950, writ ref'd, n. r. e.). The necessary elements of fraud are set out by Chief Justice Greenhill in Oilwell Division, *United States Steel Corporation v. Frayer*, 493 S.W.2d 487, 491 (Tex. Sup. 1973). It is not necessary that those elements be repeated here. The appellees did not allege all of those essential elements of fraud. Furthermore, nowhere is it alleged by any of the appellees that Patrick A. Turcotte made a promise concerning something in the future, knowing at the time it was made that he had no intention to comply with the promise. Without that essential allegation, nothing is pled except a breach of contract based solely on the fact that the promise was broken. In the absence of such an allegation, fraud is not alleged. *Precision Motors v. Cornish*, 413

S.W.2d 752 (Tex.Civ.App. — Dallas 1967, writ ref'd, n. r. e.); *Morgan v. Box*, 449 S.W.2d 499 (Tex.Civ.App. — Dallas 1969, no writ); *Medina v. Sherrod*, 391 S.W.2d 66 (Tex.Civ.App. — San Antonio 1965, no writ).

Both Putegnat and Walker testified, in substance, that during the discussion on December 21, 1963, Patrick A. Turcotte told them that the assignments would not be used to hurt them or against their interests. The appellants' objections to the admission of such testimony into evidence were overruled.

The only evidence with respect to any representations by Patrick A. Turcotte to the effect that the assignments would not be used against the interest of either Putegnat or Walker shows that they were made on December 21, 1963. There is no evidence that he made any such representations during the discussions and negotiations that were had on January 20, 1964.

[29] The continued assertion by Patrick A. Turcotte and Robert A. Turcotte that they were "persons interested" by virtue of the assignments, did not constitute a use of the assignments in such a way that the assignors suffered any legal harm. The fact that it is impossible to finally settle the entire controversy and to admit the 1960 will to probate by agreement (rather than to settle the issue of the validity of the will by a trial on the merits) so long as Patrick A. Turcotte and Robert A. Turcotte remain parties to the suit, is not evidence that the assignments have been used against the interests of Putegnat and Walker.

[30, 31] The validity of any instrument is to be determined as of the time it was made, and in the light of the circumstances surrounding the parties at that time, not at some subsequent date. *Atkins v. Womble*, 300 S.W.2d 688 (Tex.Civ.App. — Dallas 1957, writ ref'd, n. r. e.); *Ore City Co. v. Rogers*, 190 S.W. 226 (Tex.Civ.App. — Texarkana 1916, writ ref'd). At the time the assignments were negotiated, executed and delivered, there was no possible way that the use of the assignments by Patrick A. Turcotte to assert standing in court to challenge the validity of the

1960 will could conflict with the interests of Putegnat and Walker. All of the parties to the assignments were then seeking the same thing. Their interest was common. The fact that several years later the interests of the assignors changed by their compromising their claims cannot relate back so as to render false the representations which were true when made. There is no evidence that the representations were not made in good faith at the time they were made. See *San Marcos Baptist Academy v. Burgess*, 292 S.W. 626 (Tex.Civ.App. — San Antonio 1926, no writ).

[32] While it is established that Patrick A. Turcotte, at the outset of his discussions with Putegnat on December 21, 1963, was told by Putegnat that he was then being represented by a lawyer, there is no evidence that he, at that time or at any time prior to the execution and delivery of the assignments of January 20, 1964, knew about any of the provisions contained in Putegnat's contract of employment with Vela. Patrick A. Turcotte was not under any duty to make any inquiry concerning the provisions of such contract.

[33] The record further shows that on January 20, 1964, the lawyer for the assignors approved the sale of an additional five percent, and advised them to proceed. Under those facts Putegnat and Walker are estopped to assert the invalidity of the assignments because of lack of authority to execute the same on account of the contract which they had previously made with their lawyer. There is no pleading or evidence that either Putegnat or Walker made an offer to return the \$1,010.00 paid to them for each assignment. Vela did not challenge the assignments on any ground. The appellants' plea of estoppel to assert want of authority should have been sustained.

This Court, speaking through Justice Nye, now Chief Justice, in *Hidalgo County v. Pate*, 443 S.W.2d 80, 87 (Tex.Civ. App. — Corpus Christi 1969, writ ref'd, n. r. e.), said:

"The law of general application is that the execution of a contract in writing is deemed to have set aside all oral

agreements theretofore made. Any representations made prior to or contemporaneously with the execution of the written contract are inadmissible in the absence of accident, fraud or mistake of fact to contradict, change or add to the plain terms of such written contract . . ."

[34] In the instant case, the pleadings of the appellees are insufficient to allege fraud, and there are no pleadings that the assignments were executed through mistake of fact or accident. Each assignment, on its face, is complete and unambiguous. The asserted representations are not contained in any of the assignments. In that state of the record, prior understandings, if any, were merged into the assignments, and the intent of the parties must be ascertained solely from the assignments, without the aid of extrinsic evidence. *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940). Any other holding would permit the introduction of prior verbal representations that would vary the terms and provisions of written instruments that are clear and unambiguous on their face.

The testimony of Putegnat and Walker concerning the oral representation was inadmissible, and without that testimony, there is no evidence that Patrick A. Turcotte represented to Putegnat that the assignments would not be used against their interest. It was error for the court to overrule the aforesaid special exceptions which were levelled at the conclusionary allegations of fraud. It was also error to admit the testimony of Putegnat and Walker into evidence concerning the verbal conditions which they say were attached to the "obtaining" of the assignments.

Were this Court to hold, as did the district court, that since Patrick A. Turcotte and Robert A. Turcotte are estopped to contest the 1960 will in their capacities as devisees under the will of their father, Edgar Turcotte, Deceased, that they are precluded and prohibited by law "from setting up any right or claim of their own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the '1960

will', and, therefore Intervenor Patrick A. Turcotte, et al, and each of them must renounce any interest claimed by them by virtue of the purported assignments dated December 21, 1963 and January 20, 1964", we would, thereby, in effect ignore the holding in *Abrams v. Ross' Estate*, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923), and the rule that is set out in 23 Am. Jur.2d, Descent and Distribution, § 36, p. 782. This, we refuse to do. Points 27 through 49 are sustained.

[35] There is no basis for the holding that Patrick A. Turcotte and Robert A. Turcotte were not "persons interested" on the ground that the interests assigned were not actually owned by them individually, but were owned by all of the beneficiaries of the Edgar Turcotte Estate, since the consideration for each assignment was paid for by a check drawn on the Edgar Turcotte Estate Account. There are no pleadings to support any such attack on the legal ownership of the properties which were assigned and conveyed to Patrick A. Turcotte, the sole assignee and grantee named in the assignments. There is no evidence to support the court's conclusion that Patrick A. Turcotte and Robert A. Turcotte were not the sole owners of the interests originally purchased by Patrick A. Turcotte from Putegnat and Walker. Points 99 through 104 are sustained.

[36] The court further concluded:

"The description of the interest purportedly transferred under the terms of the assignments from Robert C. Putegnat and Marie Walker to Patrick A. Turcotte is insufficient as a matter of law and such assignments do not transfer to Intervenor Patrick A. Turcotte, et al a sufficient interest to maintain a contest of the probate of the '1960 Will' ".

The conclusion finds no support in the record. The appellees did not plead that the description of the interests was either insufficient or ambiguous. Moreover, the descriptions are, as a matter of law, sufficient. See *Hale v. Hollon*, 90 Tex. 427, 39 S.W. 287 (1897); *Vineyard v. O'Connor*, 90 Tex. 59, 36 S.W. 424 (1896);

Mow v. Baker, 24 S.W.2d 1 (Tex.Comm'n App. 1930); *Young v. Rudd*, 226 S.W.2d 469 (Tex.Civ.App. — Texarkana 1950, writ ref'd, n. r. e.; *McMahan v. McMahan*, 175 S.W. 157 (Tex.Civ.App. — Dallas 1915, writ ref'd). Points 95 through 98 are sustained.

[37] The record conclusively shows that none of the appellants are barred by laches from prosecuting the will contest initiated by them on December 20, 1963. Points 117 through 120 are sustained.

In view of the sustaining of the above enumerated points and of the disposition of this appeal hereinafter made, it is not necessary for us to consider any of the appellants' remaining points of error.

The judgment of the district court which was signed on June 26, 1975, insofar as it dismissed the appellants Louis Edgar Turcotte, Jr., John W. Turcotte, Joseph A. Turcotte, Elizabeth Stella Turcotte, and Elizabeth A. Turcotte from the case for want of interest in the East Estate is affirmed; the judgment insofar as it dismissed the appellants Patrick A. Turcotte and Robert A. Turcotte from the case for want of interest is reversed, and judgment is here rendered that Patrick A. Turcotte and Robert A. Turcotte are "persons interested" in the East Estate and have legal standing to maintain the will contest; the judgment insofar as it affects the appellants Patrick A. Turcotte and Robert A. Turcotte is reversed and the cause as to them is remanded to the trial court for a trial on the merits.

Costs of this appeal are taxed 50% to the appellees who filed briefs herein and 50% to the appellants, Louis Edgar Turcotte, Jr., John W. Turcotte, Joseph A. Turcotte, Elizabeth Stella Turcotte, and Elizabeth A. Turcotte.

AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REVERSED AND REMANDED IN PART.

(Key)

APPENDIX T

No. B-6474
564 SW22 682

IN THE
Supreme Court of Texas

RAUL TREVINO *et al.*,

Petitioners

v.

PATRICK A. TURCOTTE *et al.*,

Respondents

March 15, 1978

REHEARING DENIED APRIL 26, 1978

On remand in will contest, 499 S.W.2d 705, the 105th District Court, Nueces County, Joe C. Wade, J, held that two claimants were not interested persons having standing to contest a will. The Court of Civil Appeals, Bissett, J., 544 S.W.2d 463, affirmed as to all contestants except two. Appeal was taken, and the Supreme Court, Barrow, J., held that: (1) the first opinion of the Court of Civil Appeals did not establish the law of the case on the issue whether the remaining contestants were interested persons; (2) the contestants were estopped to attack the will in their capacity as devisees and legatees of ancestor who accepted and retained substantial benefits under the will; (3) the fact that the will contest was filed by others did not revive the contestants' relinquished right to contest the will; (4) the election and ratification by the contestants' ancestor, with full requisite knowledge, was binding on the contestants in their capacity as heirs, legatees or personal representatives of their ancestor; (5) certain assignments were not null and void by reason of the barratry statute,

violations of the Canons of Ethics or any illegal conduct on the assignees' part, and (6) it would be inequitable and unjust to allow the contestants to assert standing as interested persons by virtue of certain minute interests they acquire through assignments purchased for the purpose of defeating the will under which their father had elected to take.

Judgment of the Courts of Civil Appeals reversed and judgment of trial court affirmed.

Pope, J., dissented and filed opinion in which Chadick, J., joined.

1. Courts (key)99(1)

Under the doctrine of the "law of the case," the initial determination of questions of law governs the case throughout subsequent stages.

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts (key)99(1)

Application of the doctrine of the law of the case is addressed to the discretion of the Supreme Court.

3. Courts (key)107

Wills (key)400

Where Court of Civil Appeals had rendered two previous opinions in lengthy will contest litigation and where first opinion held that the trial court's judgment was erroneous and required a remand for several different reasons and Supreme Court thereafter refused application for writ of error with notation "no reversible error" such order approved only the result reached by the Court of Civil Appeals and not necessarily all statements as to the law in the opinion therefore, where second opinion of Court of Civil Appeals expressly stated that record presented by second

appeal differed materially than that presented by prior appeal, first opinion did not establish the "law of the case" on the issue whether respondents were "interested persons" entitled to contest a will.

4. Wills (key)230

A person cannot take any beneficial interest under a will and at the same time retain or claim any interest, even if well-founded, that would defeat or in any way prevent the full effect and operation of every part of the will.

5. Courts (key)202(5)

On appeal to the district court from probate matters that had their origin in county court, jurisdiction of district court is appellate only and, therefore, issues which are tried de novo in district court must be confined to issues raised by the pleadings and evidence in the county court.

6. Wills (key)285

Where issue in both county and district courts in lengthy will contest litigation was whether respondents were estopped from asserting their interest in the testatrix' estate and where acceptance of benefits was pleaded as the ground of estoppel in both courts, fact that pleadings in district court were amended to allege that the respondents were estopped because the testatrix' cousin, under whom respondents claimed, had accepted benefits under the will "with knowledge of his rights" did not inject a new issue into the proceedings or enlarge the ground of estoppel raised in probate court.

7. Wills (key)230

Whether or not devisee had knowledge of all the facts and of all his rights at the moment he accepted benefits under will was

immaterial to determining whether he, by his acts and conduct after acceptance, became estopped to contest the will.

8. Wills (key)230

The filing of a will contest by others cannot be deemed to revive a relinquished right to contest a will.

9. Wills (key)230

Testatrix' cousin, with full requisite knowledge, elected to and took substantial benefits to which he was entitled under testatrix' will and where such election was ratified by him until his death, the selection and ratification was binding upon heirs, legatees or personal representatives of testatrix' cousin and estopped them from contesting the will.

10. Champerty and Maintenance (key)6(1)

Descent and Distribution (key)86

Wills (key)743

Assignments purchased from beneficiaries and heirs at law of decedent for the express purpose of acquiring an interest in the decedent's estate giving assignees standing to maintain a will contest were not null and void by reason of the barratry statute, violations of the Canons of Ethics of the State Bar of Texas or by reason of any illegal conduct on the assignees' part.

11. Wills (key)230

A party who is estopped by equity from contesting a will by way of one interest may not avoid that estoppel by acquiring another interest which is not estopped.

12. Wills (key)230, 800

The rule of election and estoppel in will contests is based on equity and public policy and is designed to prevent one from embracing a beneficial interest devised to him under a will and

then later asserting a challenge to a will inconsistent with the acceptance of benefit.

13. Wills (key) 229

Assignees of interests of testatrix' heirs at law were not, by virtue of assignments, "persons interested" and thus entitled to contest will where assignees' admitted purpose in purchasing the assignments was to invalidate a will under which their father had received benefits and to recover through their father under testatrix' prior will and where, in the meantime, the assignees had enjoyed and continued to enjoy the fruits of property taken by their father under the will they now sought to challenge; to permit assignees to assert standing as "persons interested" by virtue of the minute interests they acquired through the assignments would be inequitable and against public policy. V.A.T.S. Probate Code, § 3(r).

See publication Words and Phrases for other judicial constructions and definitions.

Tom N. Goodwin, John E. Fitzgibbon, William C. Wright, Laredo, Day & Day, Joe Day, Fort Worth, Vela & Vela, Moises Vela, Harlingen, Downman, Jones & Musslewhite, Norman Jones, Baker & Botts, Denman Moody, Houston, Perkins, Davis, Oden & Warburton, Kenneth Oden, Alice, Lee H. Lytton, III, Corpus Christi, Rankin & Kern, Inc., H. H. Rankin, Jr., McAllen, John L. Hill, Atty. Gen., Stephen J. Wilkinson, Asst. Atty. Gen., Austin, Elmore H. Borchers, Laredo, Harry J. Schulz, Three Rivers, for petitioners.

Wood, Burney, Nesbitt & Ryan, Frank W. Nesbitt, Corpus Christi, for respondents.

BARROW, Justice.

This is a will contest involving the 1960 will of Mrs. Sarita K. East who died on February 11, 1961. The issue presented by this

appeal does not concern the actual validity of the will. It is instead whether respondents, who are the widow and six children of Edgar Turcotte, deceased, have an interest in the estate of Mrs. East which will entitle them, or some of them, to contest the will. The district court, sitting without a jury, conducted a trial on the issue of respondents' interest and entered a judgment which dismissed all respondents from the will contest on the ground that they are not interested persons within the meaning of Section 93 of the Texas Probate Code. On appeal, the court of civil appeals affirmed as to all respondents except Patrick A. Turcotte and Robert A. Turcotte. The judgment of the trial court insofar as it affects Patrick A. Turcotte and Robert A. Turcotte was reversed and remanded for trial on the merits. *Turcotte v. Trevino*, 544 S.W.2d 463 (Tex.Civ.App. — Corpus Christi, 1976). We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

The factual background of this case and the long history of the litigation is fully set out in the two opinions of the Thirteenth Court of Civil Appeals. See *Turcotte v. Trevino*, 499 S.W.2d 705 (Tex.Civ.App. — Corpus Christi 1973, writ ref'd, n. r. e.), and *Turcotte v. Trevino*, *supra*.¹ We will repeat only those facts, circumstances, and legal principles necessary for the disposition of this appeal.

¹ There have been nine previous appeals involving this estate: *Kimmel v. Lytton*, 371 S.W.2d 927 (Tex.Civ.App. — Waco 1963, writ ref'd); *Alice National Bank v. Edwards*, 383 S.W.2d 482 (Tex.Civ.App. — Corpus Christi 1964, writ ref'd n. r. e.); *Turcotte v. Alice National Bank*, 402 S.W.2d 894 (Tex. 1966); *Alice National Bank v. Edwards*, 408 S.W.2d 307 (Tex.Civ.App. — Corpus Christi 1966, no writ hist.); *Gregory v. Lytton*, 422 S.W.2d 586 (Tex.Civ.App. — San Antonio 1967, writ ref'd n. r. e.); *Corpus Christi Bank and Trust v. Alice National Bank*, 444 S.W.2d 632 (Tex. 1969); *Alice National Bank v. Trevino*, 445 S.W.2d 237 (Tex.Civ.App. — Beaumont 1969, no writ hist.); *Turcotte v. Trevino*, 467 S.W.2d 573 (Tex.Civ.App. — Corpus Christi 1971, writ ref'd n. r. e.); *Turcotte v. Trevino*, 499 S.W.2d 705 (Tex.Civ.App. — Corpus Christi 1973, writ ref'd n. r. e.).

Mrs. East executed one will dated December 31, 1948, and another on January 22, 1960. Four codicils were subsequently made to the 1960 will. The 1960 will was duly admitted to probate and Edgar Turcotte qualified as one of three independent executors of the estate; he served in that capacity until his death on March 18, 1963. On July 25, 1962, petitioner Raul Trevino and 39 others filed a will contest. Numerous parties intervened including Patrick A. Turcotte, individually and in his capacity as Independent Executor of the Estate of Edgar Turcotte, who intervened along with Edgar Turcotte's widow and other children on December 20, 1963. Marie Walker and her brother, Robert C. Putegnat, intervened on September 30, 1963. At one time there were over 120 contestants of the 1960 will. All contestants, with the exception of respondents, have now been finally dismissed, or have settled and agreed to probate the 1960 will.

None of the respondents is an heir at law of Mrs. East. Three of Edgar Turcotte's children, Jack, Joe and L. E. Jr., were employees of Mrs. East at the time of her death and, as such, received cash bequests under the 1960 will. None of the other respondents is a legatee or devisee under either the 1948 or 1960 wills. Respondents urge, however, that they are "interested persons" in that they are the sole heirs at law, and the only beneficiaries under the will, of Edgar Turcotte, a cousin of Mrs. East and a devisee of substantial bequests in both the 1948 and 1960 wills. In addition, Patrick and Robert Turcotte claim to be interested persons in the East estate in their own right by virtue of assignments which they acquired from Marie Walker and Robert Putegnat. Patrick Turcotte purchased a total of ten percent of Walker's and Putegnat's interests "in expectancy or otherwise as an heir at law or as a beneficiary under any valid will and testament of Sarita K. East, Deceased." Marie Walker and Robert Putegnat are not beneficiaries under the 1960 will, but are beneficiaries under the 1948 will as well as remote heirs at law. Patrick Turcotte subsequently assigned $\frac{1}{16}$ th of his interest to Robert Turcotte.

On June 1, 1971, during the trial on the validity of the 1960 will, the trial court dismissed these same respondents from the case then pending on the ground that they were estopped as a matter of law from contesting the 1960 will. That action was reversed by the court of civil appeals and the cause remanded with instructions that the issues of respondents' interest must be tried separately and in advance of a trial on the validity of the will. 499 S.W.2d 705. This was done and, on June 26, 1975, the trial court entered a final judgment which dismissed respondents from the will contest.²

[1, 2] At the outset, since this is the second appeal of the case involving the issue of whether respondents are "persons interested," we must consider whether or not the first opinion of the court of civil appeals established the "law of the case." The doctrine of the law of the case is defined as that principle under which the initial determination of questions of law will be held to govern the case throughout its subsequent stages. *Kropp v. Prather*, 526 S.W.2d 283 (Tex.Civ.App. — Tyler 1975, writ ref'd n. r. e.). Application of the doctrine is addressed to the discretion of this Court. *Kempner v. Huddleston*, 90 Tex. 182, 37 S.W. 1066 (1896).

[3] It should be recognized that neither the trial court nor the appellate court relied upon the doctrine as a basis for the judgment which is now before us. To the contrary, the second opinion of the court of civil appeals expressly stated that the record presented by the second appeal differs materially from that presented by the prior appeal. The court observed that the type and character of the pleadings, the allegations contained therein, and the theory of the attack differed in many respects in the two trials. The estoppel in the first trial court judgment was found as a matter of law without a full development of the facts. The case

² Since there were no other contestants in the case, the trial court entered judgment dismissing the will contest.

was remanded for such development and the second judgment was based on findings of fact by the trial court.

The first opinion held that the trial court's judgment was erroneous and required a remand for several different reasons. By refusing the application for writ of error with the notation of "no reversible error" the Supreme Court approved only the result reached by the court of civil appeals and not necessarily all the statements as to the law in the opinion. *Fant v. Howell*, 547 S.W.2d 261 (Tex.1977).

We conclude that the first opinion did not establish "the law of this case" on the issue of whether or not respondents are "persons interested."

After the trial on the interest of respondents, numerous findings of fact and conclusions of law were made by the trial court. Essentially, the trial court ruled that all of the respondents were estopped to contest the 1960 will because Edgar Turcotte, from whom the respondents received an interest in the East estate, would be estopped to contest the will in that he accepted and retained substantial benefits under the 1960 will. The court further held that Patrick Turcotte and Robert Turcotte were not "persons interested" in the estate by virtue of the assignments.

[4] The court of civil appeals affirmed the ruling that respondents were estopped to attack the 1960 will in their capacities as devisees and legatees of Edgar Turcotte. We affirm that holding. It is a fundamental rule of law that a person cannot take any beneficial interest under a will and at the same time retain or claim any interest, even if well founded, which would defeat or in any way prevent the full effect and operation of every part of the will. *Miller v. Miller*, 149 Tex. 543, 235 S.W.2d 624 (1951); *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935); *Lindsley v. Lindsley*, 139 Tex. 512, 163 S.W.2d 633 (Tex.Com.App.1942, opinion adopted); *Dunn v. Vinyard*, 251 S.W. 1043 (Tex.Com.App.1923, judgment adopted); *Smith v. Negley*, 304 S.W.2d 464 (Tex.Civ.App. — Austin 1957, no writ hist.). Re-

spondents attempt to avoid this rule of law by arguing that the court of civil appeals' holding is without support by proper pleading in the probate court, without support of credible evidence, and is contrary to law under the facts of this case.

[5, 6] Respondents contend that the pleadings in the probate court were not sufficient to raise the issue of estoppel by acceptance of benefits in the district court since not all elements of estoppel, specifically acceptance *with knowledge*, were pled. It is settled that on appeal to the district court from probate matters which have had their origin in the county court, the jurisdiction of the district court is appellate only and, therefore, the issues which are tried de novo in the district court must be confined to issues raised by the pleadings and the evidence in the county court. *Holliday v. Smith*, 422 S.W.2d 791, 795 (Tex.Civ.App. — Corpus Christi 1967, writ ref'd n. r. e.); *Olds v. Traylor*, 180 S.W.2d 511, 518 (Tex.Civ.App. — Waco 1944, writ ref'd). As pointed out by the court of civil appeals, the *issue* in both the county and district courts in this case was whether respondents were estopped from asserting their interest in the East estate. The same *ground* of estoppel — acceptance of benefits — was pled in both courts. The pleadings in the district court which were amended to allege that the respondents were estopped because Edgar Turcotte had accepted benefits under the will *with knowledge of his rights* did not therefore inject a new issue into the proceedings or even enlarge the ground of estoppel raised in the probate court.

[7] Respondents further assert there was no evidence that, at the time Edgar Turcotte accepted benefits under the will, he knew or should have known that the will contest would be filed by others, and that such knowledge is a necessary element of estoppel. Whether or not Edgar Turcotte had knowledge of all the facts and of all his rights at the moment he accepted the benefits is immaterial to a determination that he, by his acts and conduct after acceptance, became estopped to contest the will.

Clearly, there is more than a scintilla of evidence to support the finding of the trial court that Edgar Turcotte did take many of the substantial benefits to which he was entitled under the 1960 will, and that he never revoked, or intended to revoke, his acceptance. He qualified under the will as one of the independent executors of the estate of Mrs. East and performed numerous duties as such until his death on March 18, 1963. He never contested the will. To the contrary, as executor, he defended the probate of the will in court. He accepted his share of the 43,000-acre San Pablo Ranch and he partitioned same, together with the cattle and personal property thereon, with his sister, Stella T. Lytton. He made improvements on this ranch and operated it until his death. In all, he accepted and took possession of approximately \$1,300,000 worth of benefits under the 1960 will. He was advised by an attorney that his acceptance under the 1960 will would preclude any claim by him for benefits under the 1948 will. He never returned or tendered a return of those properties during his lifetime. Respondents are still in possession of these properties and the income therefrom.

[8] Respondents also assert that they are not estopped because the will contest was initiated by people other than themselves. They urge that since a will contest is a proceeding in rem, the adjudication of property rights in the contest could affect the rights of the Turcottes. It is therefore argued that the personal estoppel against Edgar Turcotte and his privies should be precluded as a matter of law because to bar respondents from participating as contestants lacks mutuality, is prejudicial and is a denial of due process of law. We hold that the filing of a will contest by others cannot be deemed to revive the respondents' relinquished right to contest the 1960 will. Furthermore, now that all contestants of the 1960 will except the respondents have settled and no longer challenge its validity, the respondents' contentions in this vein are moot.

[9] We therefore hold that there are pleadings and evidence to support the finding that Edgar Turcotte, with full requisite knowledge, elected to and did take the substantial benefits to which he was entitled under the 1960 will, and that this election was ratified by him until his death. This election and ratification is binding upon respondents in their capacity as heirs, legatees, or personal representatives of Edgar Turcotte, deceased. *Wells v. Petree*, 39 Tex. 419 (1873); *Lancaster v. Burris*, 352 S.W.2d 136 (Tex.Civ.App. — San Antonio 1961, no writ hist.); *Cunningham v. Townsend*, 291 S.W.2d 438 (Tex.Civ.App. — Eastland 1956, writ ref'd n. r. e.). The court of civil appeals did not err in holding that respondents did not have such an interest in these capacities to contest the 1960 will of Mrs. East.

[10] Respondents Patrick Turcotte and Robert Turcotte also claim to be interested persons to contest the 1960 will by virtue of the assignments purchased from Robert C. Putegnatt and his sister, Marie Walker, beneficiaries under the 1948 will and heirs at law of Mrs. East. The court of civil appeals reversed the trial court's finding that the assignments were invalid and rendered judgment holding Patrick and Robert Turcotte to be interested persons.

Petitioners do not question the established rule in this State that the heirs, devisees and legatees of a decedent may validly assign all or any part of their interests in a decedent's estate. *Morris v. Halbert*, 36 Tex. 19 (1871); *Geraghty v. Randals*, 224 S.W.2d 327 (Tex.Civ.App. — Waco 1949, no writ); 61 Tex. Jur.2d Wills, § 324. Neither do they dispute the rule that assignees of an heir at law have such interest in testator's will which enables them to contest its validity. Tex.Prob.Code Ann. Sec. 3(r) (1956); *Dickson v. Dickson*, 5 S.W.2d 744 (Tex.Com.App.1928, judgment adopted). Petitioners do urge, however, that under the facts and circumstances in this case Patrick and Robert Turcotte should not be permitted to use these

assignments to gain standing as "persons interested" to contest the 1960 will of Mrs. East.

The record fairly supports the conclusion that the assignments were acquired by Patrick A. Turcotte for the express purpose of acquiring an interest in the East estate which would give him standing to maintain the will contest should it be found that Edgar Turcotte and those claiming through him were estopped. This plan was undertaken after Patrick Turcotte had been advised by several attorneys that the probable estoppel of Edgar Turcotte would present at least a serious question to his intervention in the will contest. Patrick Turcotte commenced a search for an heir at law of Mrs. East or a beneficiary of the 1948 will who was not a beneficiary of the 1960 will. He learned the Putegnat family had been bequeathed \$20,000 in the 1948 will and that Robert Putegnat and Marie Walker are each entitled to $\frac{1}{3}$ rd of their father's $\frac{1}{6}$ th interest in this bequest. Patrick Turcotte first offered to furnish an attorney to Robert Putegnat for a five percent share in his interest, but after learning that Putegnat already was represented by an attorney, Patrick undertook to purchase an interest in Putegnat's claim. Putegnat accepted Patrick's offer of \$1,000 for a five percent share in Putegnat's claim. Putegnat also agreed to try to purchase for Patrick similar interests from other heirs at law for a commission of \$100. Accordingly, Putegnat contacted his sister, Marie Walker, and her husband who agreed to assign Patrick a five percent interest in her claim for \$1,000. About a month later, Putegnat and Marie Walker contacted Patrick Turcotte and each assigned him an additional five percent interest for \$1,000 each. Putegnat was paid \$400 in total commissions by Patrick for these four assignments.

Although the assignments were taken in the name of Patrick Turcotte, they were paid for with checks drawn on the Edgar Turcotte Estate Trust Account. It is reasonable to assume that Patrick intended, at one time at least, that these assignments

would be owned jointly by the heirs of Edgar Turcotte in that he voluntarily assigned Robert Turcotte a $\frac{1}{12}$ th interest. Since the interests purchased by Patrick Turcotte for over \$4000 would be worth only about \$220 if the 1948 will is probated, the logical conclusion to be drawn is that these interests were acquired for the purpose of securing standing to maintain a will contest.

We agree with the holding of the court of civil appeals that the assignments to Patrick Turcotte are not null and void by reason of the barratry statute, violations of the Canons of Ethics of the State Bar of Texas, or any illegal conduct on his part. Patrick's offer to represent Putegnatt was not pressed after he learned that Putegnatt already had an attorney. Instead, negotiations were had leading to the purchase by Patrick Turcotte of the four assignments.

Therefore, the decisive question presented narrows to whether or not Patrick and Robert Turcotte, although personally estopped from contesting the 1960 will as beneficiaries of their father, may "unestop" themselves by purchasing a ten percent interest in the claims of two remote heirs of Mrs. East, claims which are inconsistent with and would defeat the interest already accepted by the Turcottes through their father. We have been unable to find a Texas case which has squarely considered this point. The court of civil appeals held that the assignees may do so and cited the following authorities in support of this holding: *Dickson v. Dickson*, 5 S.W.2d 744 (Tex.Com.App.1928, judgment adopted); *Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex.Com.App.1923, judgment adopted); 23 Am.Jur.2d, *Descent and Distribution*, § 36 (1965). We do not find any of these authorities as controlling the disposition of this case.

The question before the court in *Dickson, supra*, was whether the right of a deceased who occupied the position of a "person interested" which would have entitled him to contest the probate of a will passed by the terms of his will or died with him. It was held that the right of action is assignable and is the subject of

conveyance, and that a "person interested" means anyone who has an interest in the subject matter of the proceeding. The court did not consider or speak to the question of whether such party could assert such right when it would be inconsistent with a position the party had previously elected to adopt under a will.

In *Abrams, supra*, the contestants asserted alternate interests in the estate by claiming under the purchaser of the land in controversy at an execution sale and also under a conveyance from the grandson of testatrix. It was held that both of these interests would be affected by the probate of the will and therefore contestants were "persons interested" and entitled to maintain the contest under either claim. The court held that contestants had a right to plead both their titles in the alternative and, if either title proved to be an interest in the estate of testatrix, they were entitled to contest such probate. The court neither considered nor spoke to the question of the effect of an estoppel as a bar to one of the titles.

The final authority cited by the court of civil appeals is a partial quote from 23 Am.Jur.2d, *supra*, as follows:

"... Estoppels, where operating against the ancestor, do not operate against his heirs as to property not inherited from the ancestor, but acquired from an independent source. Hence an heir is not bound by such an estoppel with respect to property taken by purchase, or devise, or inheritance, from one other than the particular ancestor."

This sentence relies on five cases, none of which are Texas cases. Three, *French v. McMillion*, 79 W.Va. 639, 91 S.E. 538 (1917); *Foote v. Clark*, 102 Mo. 394, 14 S.W. 981 (1890), and *Russ v. Alpaugh*, 118 Mass. 369 (1875), are very similar. In *French* the father of the plaintiff conveyed, by warranty deed, the land he lived on and apparently owned. The land was actually owned by the grandmother of the plaintiff. The plaintiff claimed title alternatively as the heir of the father and as the heir of the grandmother. The court found that the same estoppel or warranty

which would have prevented the father from claiming title to the land would also operate to prevent the plaintiff from claiming title as the heir of the father. However, the court went on to find that title was never vested in the father since he predeceased the grandmother, and that upon the grandmother's death, title passed directly to the plaintiff. The estoppel which prevented him from claiming title through the father was held not to operate to also prevent him from claiming through the grandmother.

Similarly, in *Russ and Foote* the estoppel which would have prevented the children from claiming title as heirs of one parent who had apparently conveyed away the land did not prevent them from acquiring the land as heirs of the other parent who at death, actually had title. In *Oliver v. Piatt*, 3 How. 333, 11 L.Ed. 622 (1844), and *McSwain v. Griffin*, 218 Miss. 517, 67 So.2d 479 (1953), the heirs stood in the shoes of a decedent who would have been estopped from claiming title to land, but were held not to also be estopped from acquiring valid title by purchasing the land in question.

We do not believe that the quoted rule controls the situation before us in that none of the cases cited in support thereof involved a will contest. There was no heir before the court in any of those cases who was a successor in interest standing in the shoes of his ancestor to any rights or properties which were inconsistent with, or which would defeat in any manner, the property right which the heir was then claiming.

The New York case of *De Witt v. Jayne*, 222 App.Div. 674, 225 N.Y.S. 97 (1927), supports petitioners' position on this point. It was there held that plaintiff and the other legatees under the will of plaintiff's sister, having accepted their legacies, were personally estopped from later claiming any interest in the estate of the deceased hostile to the will. Furthermore, plaintiff was held to be estopped for the same reason from asserting the claims assigned to her by the other beneficiaries under the will.

Although we have found no Texas case which considered the question of "unestoppel" in regards to a will contest, Texas courts have rejected the somewhat analogous arguments that a person may circumvent his estoppel by acquiring a chain of title unrelated to the estoppel. See *Adams v. Duncan*, 147 Tex. 332, 215 S.W.2d 599 (1948); *Doty v. Barnard*, 92 Tex. 104, 47 S.W. 712 (1898); *Waco Bridge Co. v. City of Waco*, 85 Tex. 320, 20 S.W. 137 (1892).

[11, 12] The question before us is not, as in *Abrams*, whether or not interests may be alternatively asserted as grounds for contesting a will; it is instead whether or not a party who is estopped by equity from contesting by way of one interest may avoid that estoppel by acquiring another interest which is not estopped. No court has so held. To so hold would make a mockery of the equitable rule of election in will contests. The rule of election and estoppel in will contests is based upon equity and public policy. It is designed to prevent one from embracing a beneficial interest devised to him under a will, and then later asserting a challenge of the will inconsistent with the acceptance of benefits.

[13] Here respondents Patrick and Robert Turcotte are seeking to assert the relatively minute interests assigned to them in order to contest the 1960 will which their father ratified by his election. Yet their admitted purpose in invalidating such will is to recover through their father since respondents are neither beneficiaries under the 1948 will nor heirs at law.³ In the meantime respondents have enjoyed, and continue to enjoy, the fruits of their father's election in that they remain in possession of the property taken by Edgar Turcotte under the 1960 will, and have earned almost one million dollars from same. They admit that over \$150,000 from the estate bank account has been spent on this contest of the 1960 will. True, respondents have pleaded that

³ Respondents prayed that the 1960 will be held for naught and that the 1948 will be probated.

they are willing to tender back the property received by them should the 1960 will be invalidated. However, even assuming that a valid tender could be made after these many years of unqualified possession, the election to take or not to take is not the respondents' to make; it was made long ago by Edgar Turcotte. Respondents cannot now repudiate that election.

The Putegnat heirs, including Robert Putegnat and Marie Walker, as well as all other contestants, have now settled their claims and no longer desire to contest the 1960 will. Putegnat and Marie Walker have offered to pay Patrick and Robert Turcotte ten percent of the interest to be received by Putegnat and Marie Walker.

We conclude that it would be inequitable and unjust to allow Patrick and Robert Turcotte to assert standing as interested parties by virtue of the minute interests acquired through the assignments purchased for the purpose of defeating the will under which their father elected to take. Furthermore, to permit standing under such circumstances is against public policy in that it would breed litigation and deprive the real parties at interest of their right to compromise and settle their controversies.

Therefore, the court of civil appeals erred in holding that Patrick and Robert Turcotte are persons interested in the Sarita K. East estate and, as such, entitled to contest the 1960 will. The judgment of the court of civil appeals is reversed and the judgment of the trial court affirmed.

POPE, J., dissents in an opinion in which CHADICK, J., joins.

POPE, Justice, dissenting.

I respectfully dissent. I do not agree with that part of this court's opinion which denies standing to Patrick and Robert Turcotte in their attack upon Mrs. Sarita East's 1960 will and its codicils. In my judgment the Turcottes have the same standing as their assignors, Marie Walker and Robert C. Putegnat. Walker and Putegnat are the heirs of Mrs. East, and they also have an

interest as devisees under Mrs. East's earlier 1948 will, which might become operative if the 1960 will were invalidated. The majority recognizes that Marie Walker and Robert Putegnatt had an interest and standing, but in some mysterious manner, a part of their interest and standing vanished by their assignment to the Turcottes.

Mrs. Sarita K. East executed a will in 1948, and in 1960 she made a new will. A number of codicils were later added to the 1960 will. After Mrs. East died in 1961, some 120 persons set about to prove that the 1960 will and the codicils were void because Christopher Gregory, also known as Brother Leo, had overreached Mrs. East by undue influence and fraud. That contest was tried in the probate court of Kenedy County which rendered a judgment that the 1960 will was void and which admitted the 1948 will to probate. There was an appeal to the district court. See *Alice National Bank v. Corpus Christi Bank & Trust*, 431 S.W.2d 611 (Tex.Civ.App. — Corpus Christi 1968), *aff'd*, 444 S.W.2d 632 (Tex. 1969).

All of the parties who originally urged the invalidity of the 1960 will have now, we are told, made settlements in the vast estate — all, that is, except Parick and Robert Turcotte. The majority opinion says that the Turcottes should not now be permitted to assert their rights or test the validity of the 1960 will, because it would be "inequitable and unjust to allow Patrick and Robert Turcotte to assert standing as interested parties." The assignments that they own have not been set aside or voided by any legal proceeding and the majority opinion confirms their validity. In my opinion, the Turcottes have standing, and it is inequitable and unjust to deny them their day in court to make proof that Mrs. East was overreached when she made the 1960 will.

The Turcottes assert their standing on two independent bases, either of which entitles them to contest the 1960 will. They first assert that they are the sons of Edgar Turcotte who was a beneficiary under Mrs. East's 1960 will. Edgar Turcotte received

substantial benefits under the 1960 will, but the Turcottes say that he did so without full knowledge of the undue influence and fraud of Father Leo, and also that Edgar Turcotte did not know that he was granted even greater benefits under the earlier 1948 will and its codicil. Edgar Turcotte died and his two sons then received by devise a part of what Edgar had received under Mrs. East's 1960 will. Patrick and Robert Turcotte urge that in 1973 when this same issue was before the court of civil appeals that the court ruled that Edgar Turcotte was not estopped unless there were pleadings and proof that he received the benefits of the 1960 will with knowledge of the facts. 499 S.W.2d 705, 712-15 (Tex.Civ.App. — Corpus Christi 1973, writ *ref'd n.r.e.*). The court of civil appeals at that time ruled:

There is neither pleading nor evidence to support the findings that Edgar Turcotte, at the time he accepted benefits under the contested will, had full knowledge of the lack of testamentary capacity of Mrs. East when she executed the will.

Patrick and Robert advance a second basis to establish their standing to attack the 1960 will. They own an interest entirely independent of their claims as children of Edgar Turcotte, one of the beneficiaries of the 1960 will. Robert C. Putegnat and his sister Marie Walker were second cousins of Mrs. East and as such were her heirs at law. They were also named as beneficiaries by a codicil to Mrs. East's 1948 will. They were not named as beneficiaries under the 1960 will. Putegnat and Walker contested the 1960 will, and there has at no time been any pleading or contention that those parties lacked standing to sue to strike down the 1960 will.

Putegnat and Walker sold a part of their valid and nonestopped claim to Patrick and Robert Turcotte by transactions which the majority opinion upholds as valid. In other words, Patrick and Robert Turcotte lawfully bought the interests of Putegnat and Walker and the majority upholds the lawfulness of the purchase.

We thus have the situation in which Patrick and Robert Turcotte bought an unestopped interest; however, this court denied them the right to assert that unestopped interest.

Patrick and Robert Turcottes' standing, provided they factually proved their acquisition of the interests, was decided in the earlier appeal of this case. Patrick and Robert Turcotte rely upon these express holdings by the court of civil appeals on the former appeal about standing: Patrick Turcotte had the legal right to purchase from other heirs an interest in Mrs. East's estate; Patrick and Robert Turcotte had the right to plead their interest based on (a) what they acquired by devise under the will of their father Edgar Turcotte, and (b) that which they purchased from Marie Walker; if either title so pleaded was proved, they were entitled to prosecute the will contest; an estoppel against Robert Turcotte by reason of his devise under his father's will does not cut off his interest acquired by purchase from Marie Walker; neither Patrick nor Robert Turcotte were personally estopped from contesting Mrs. East's will, because they were not named as beneficiaries in her will, "They having accepted no benefits under Mrs. East's will" *Turcotte v. Trevino*, 499 S.W.2d 705, 721-22.

The majority now rejects all of those earlier holdings, but writes at length to excuse and justify its disregard of the earlier 1973 opinion. The point before the court of civil appeals in 1973 and this court on application for writ of error in that former case, was whether the Turcottes had standing as the assignee of a part of an unestopped claim of Marie Walker. It is correct that the court of civil appeals recognized differences in the records of the two appeals of these same parties. But the court of civil appeals, writing on this second appeal, recognized the identity of the parties and problem, and it applied the same rule in the second appeal that it did in the first one. Whatever may be the other differences in this and the earlier records on appeal, the records are the same concerning the rights of the Turcottes to assert rights under their valid assignments.

Lest there be any question of the sameness of the issue and parties in the earlier¹ and the present² appeal, we should examine

¹ *Turcotte v. Trevino*, 499 S.W.2d 705, 721-22 (Tex.Civ.App. — Corpus Christi 1973, writ ref'd n. r. e.):

It is without dispute in the record that Marie Walker is an heir at law of Mrs. East as well as one of the beneficiaries entitled to share in a \$20,000.00 legacy bequeathed by the 1948 will. As such, she holds the necessary justiciable interest in the East estate to maintain the will contest, and did, in fact, do so.

It is settled law in this State that the heirs, devisees and legatees of a decedent may validly assign all or any part of their rights and interests in a decedent's estate to another person. *Morris v. Halbert*, 36 Tex. 19 (1891) [sic]; *Geraghty v. Randals*, 224 S.W.2d 327 (Tex.Civ.App. — Waco 1949, n. w. h.); 20 Tex.Jur.2d, Descent and Distribution, § 33, p. 116. An assignee of an heir at law or of a devisee or legatee of a decedent has a right to prosecute a will contest to set aside a will which prejudicially affects the rights or properties transferred by the assignment. *Dickson v. Dickson*, 5 S.W.2d 744 (Tex.Com.App.1938) [sic].

The rule is set forth in 23 Am.Jur.2d, Descent and Distribution, § 36, p. 782, as follows:

"... Estoppels, where operating against the ancestor, do not operate against his heir as to property not inherited from the ancestor but acquired from an independent source. Hence, [sic] an heir is not bound by such an estoppel with respect to property taken by purchase, or devise, or inheritance [sic] from one other than the particular ancestor".

In *Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex.Com.App.1923), the will contestant had acquired two rights, through different sources, to maintain a will contest. He sued on the basis of both rights. The court held that he was entitled to maintain the will contest if either right be valid, saying:

"... They were not required to rely upon one or the other. If either title pleaded showed in them any interest in the estate of Sarah Ross, in the absence of the probate of her will, they were entitled to contest such probate.

² *Turcotte v. Trevino*, 544 S.W.2d 463, 474 (Tex.Civ.App. — Corpus Christi 1976);

It is settled law in this State that the heirs, devisees and legatees of a decedent may validly assign all or any part of their rights and interests in a decedent's estate to another person. *Morris v. Halbert*, 36 Tex. 19 (1871); *Geraghty v. Randals*, 224 S.W.2d 327

the verbatim holdings in the two opinions written by the same judge of the same court about the same point. Five years ago the court of civil appeals relied upon *Dickson v. Dickson*, 5 S.W.2d 744 (Tex.Com.App.1928, judgment adopted); *Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex.Com.App.1923, judgment adopted), and 23 Am.Jur.2d, *Descent and Distribution*, § 36 (1965). The court of civil appeals in this case believed that it was applying the law of the case, because it cited the 1973 case of *Turcotte v. Trevino*.

Patrick and Robert Turcotte have now done precisely what they were told they needed to do by the 1973 remand of this case. They returned to the trial court and made the factual proof of their standing. They now learn that the retrial upon the remand was an empty and useless effort. As stated by the majority opinion, this court has the power to ignore the law of the case, but it is unfortunate that we have chosen to do so after so long a delay which we ordered, and after the waste of so much time and

(Tex.Civ.App. — Waco 1949, no writ); 20 Tex.Jur.2d, *Descent and Distribution*, § 33. An assignee of an heir at law, devisee or legatee of a decedent has a legal right to maintain a will contest to set aside a will which prejudicially affects the properties assigned or conveyed to him by the assignment under which he claims. *Dickson v. Dickson*, 5 S.W.2d 744 (Tex.Comm'n App.1928).

* * * * *

The rule is set forth in 23 Am.Jur.2d, *Descent and Distribution*, § 36, p. 782, as follows:

"... Estoppels, where operating against the ancestor, do not operate against his heir as to property not inherited from the ancestor, [sic] but acquired from an independent source. Hence an heir is not bound by such an estoppel with respect to property taken by purchase, or devise, or inheritance, from one other than the particular ancestor".

A will contestant who has acquired rights through different sources to property owned by the decedent and disposed of by will may file a suit to contest a will. Such contestant is entitled to maintain the will contest if either right be valid, and he is not required to rely upon one or the other. *Abrams v. Ross Estate*, 250 S.W. 1019 (Tex.Comm'n App.1923); *Turcotte v. Trevino*, supra.

money upon a retrial that really should not have been conducted. The majority has found no better reasons than those urged in the former appeal for its change of mind, and it cites no Texas authority for its rule that, in this instance, it would be "inequitable and unjust" to allow Patrick and Robert Turcotte to conduct a trial which would determine which will in truth was Mrs. East's last will. That issue will now never be determined. In my opinion this is a textbook example for the application of the law of the case. *Kendall & Harcourt v. Mather*, 48 Tex. 585, 597-98 (1878); *Wood v. Wheeler*, 9 Tex. 127 (1852).

I agree with the opinion of the court of civil appeals, and I would refuse the writ, no reversible error, and permit Patrick and Robert Turcotte, who have a valid assignment from unestopped heirs and devisees, to make their proof about the testamentary capacity of Mrs. East and on the issues of fraud, undue influence and duress. I do not believe that the property rights which Patrick and Robert purchased should be deemed expendable.

CHADICK, J., joins in this dissent.

(5)
No. 86-1673

Supreme Court, U.S.
FILED

JUL 17 1987

JUSTINE GRANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.,*
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

JAMES D. ST. CLAIR, P.C.*
THOMAS N. O'CONNOR
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100

*Attorneys for Petitioner,
Christopher Gregory*

* Counsel of Record

July 17, 1987

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
REPLY POINT I	
Contrary To The Respondents' Argument, The Conflict Between The Circuit Courts Of Appeals Is Clear And Substantial And Warrants Resolution By This Court	2
REPLY POINT II	
The Proceeding On September 21, 1979 Was A Hearing, Not A Trial As Asserted By The Respondents	4
REPLY POINT III	
Gregory's Jury Demand Was Timely Under Texas Law	5
CONCLUSION	6
TEXAS RULES OF CIVIL PROCEDURE CITED IN REPLY BRIEF	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Bailey v. Andrews</i> , 811 F.2d 366 (7th Cir. 1987)	3
<i>Burnaman v. Heaton</i> , 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951)	5
<i>Carter v. Emporia</i> , 815 F.2d 617 (10th Cir. 1987) ..	2
<i>Coleman v. Sadler</i> , 608 S.W.2d 344 (Tex. Civ. App. —Amarillo 1980)	5
<i>Jones v. City of Alton</i> , 757 F.2d 878 (7th Cir. 1985)	2
<i>Hussein v. Oshkosh Motor Truck Co.</i> , 816 F.2d 348 (7th Cir. 1987)	6
<i>Rhoades v. Penfold</i> , 694 F.2d 1043 (5th Cir. 1983) ..	3
<i>Scroggins v. Kansas</i> , 802 F.2d 1289 (10th Cir. 1986)	3
<i>Tower v. Glover</i> , 467 U.S. 914 (1984)	3

STATUTES AND RULES

28 U.S.C. § 1738	3, 6
42 U.S.C. § 1981	6
42 U.S.C. § 1983	2, 3, 4, 6
Sup. Ct. Rule 22.5	1
Tex. R. Civ. P. 21	4
Tex. R. Civ. P. 216	5
Tex. R. Civ. P. 245	4
Tex. R. Civ. P. 246	4
Tex. R. Civ. P. 247	4
Tex. R. Civ. P. 248	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1673

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to Supreme Court Rule 22.5, the Petitioner, Christopher Gregory ("Gregory"), files this brief in reply to Respondents' Brief In Opposition to Christopher Gregory's Petition for Writ of Certiorari.¹

¹ The Respondents' Brief in Opposition to Christopher Gregory's Petition for Writ of Certiorari will be cited herein as "Resp. Opp. pp. —". Gregory's Appendices, previously filed with his Petition, will be cited herein as "Pet. App. —".

REPLY POINT I**Contrary To The Respondents' Argument, The Conflict Between The Circuit Courts Of Appeals Is Clear And Substantial And Warrants Resolution By This Court**

The respondents argue there is no conflict between the Fifth Circuit Court of Appeals' decision in this case and several recent decisions issued by the Tenth and Seventh Circuit Courts of Appeals because in all cases the federal courts merely apply the preclusion doctrines of the applicable state. (Resp. Opp. pp. 24-25). The respondents' contention is erroneous.

As the Tenth Circuit recently confirmed, its preclusion analysis does not end merely with a determination of whether a subsequent claim under 42 U.S.C. § 1983 is barred by a state's preclusion rules:

Even when the requirements of claim preclusion discussed above are satisfied, we will still inquire whether plaintiffs have had a full and fair opportunity to litigate their claims before a court with the authority to adjudicate the merits of those claims. *See, e.g., Scroggins v. Kansas*, 802 F.2d 1289, 1291 (10th Cir. 1986); *cf. Thournir v. Meyer*, 803 F.2d 1093, 1094-95 (10th Cir. 1986).

Carter v. Emporia, 815 F.2d 617, 621 (10th Cir. 1987). The Seventh Circuit likewise has held that proper analysis requires more than the mere application of state preclusion rules, and includes the additional, federally-imposed requirement that a plaintiff have had "a full and fair opportunity to litigate his claims" in the prior state court action. *Jones v. City of Alton*, 757 F.2d 878, 884 (7th Cir. 1985).

By contrast, the Fifth Circuit's analysis in this case went no further than a straight application of Texas preclusion rules. (*See* Pet. App. A, pp. 8c-10a). The Fifth Circuit did not independently consider whether Gregory had a full and fair opportunity to litigate his

claims in the Texas state courts. Had the Fifth Circuit done so, and followed the analysis employed by the Tenth and Seventh Circuits, Gregory's federal claims under § 1983 would not have been barred by state preclusion rules and 28 U.S.C. § 1738. *See, e.g., Scroggins v. Kansas*, 802 F.2d 1289, 1291 (10th Cir. 1986).

Moreover, the Seventh Court recently held in *Bailey v. Andrews*, 811 F.2d 366, 370 (7th Cir. 1987) that state preclusion rules are inapplicable where, as here, the § 1983 plaintiff is challenging the integrity of a prior state court ruling or the evidence on which it is based. *See also Rhoades v. Penfold*, 694 F.2d 1043, 1047 (5th Cir. 1983) (plaintiff's complaint challenging the integrity of the underlying state court judgment as constitutionally defective under the Due Process Clause held to state a claim under § 1983 and *not* barred by *res judicata*). The Fifth Circuit never addressed this separate issue and never cited or discussed the *Rhoades* case in its decision.

Gregory vigorously argued before the District Court and the Fifth Circuit that the Texas consent judgment is not entitled to preclusive effect because it lacks integrity as a result of the unlawful method and manner by which it was procured by the respondents. If the Fifth Circuit had applied the rule and analysis in *Bailey* to the facts of this case, it should have held Texas preclusion rules inapplicable and permitted Gregory to proceed to trial on his § 1983 claims. Moreover, the holding in *Bailey* is consistent with this Court's decision in *Tower v. Glover*, 467 U.S. 914 (1984), an important case completely ignored both by the respondents in their opposition and by the Fifth Circuit in its opinion.

Thus, contrary to the respondents' contention that the decisions of the Tenth and Seventh Circuits may be disregarded as "clearly distinguishable" from the Fifth Circuit's decision in this case (Resp. Opp. p. 25), there exists a real and substantial conflict between the Federal Courts of Appeals with respect to the proper legal stand-

ards and analyses to be employed by the federal courts in their respective applications of state preclusion doctrines in a § 1983 case. Gregory's Petition should therefore be granted and this Court should resolve this significant conflict by pronouncing uniform legal standards and methods of analysis where prior state court judgments are raised as potential bars to subsequent federal suits brought under 42 U.S.C. § 1983.

REPLY POINT II

The Proceeding On September 21, 1979 Was A Hearing, Not A Trial As Asserted By The Respondents

The respondents blithely assert on numerous occasions in their opposition that the proceeding held by the Texas District Court on September 21, 1979, was a "trial." (Resp. Opp. pp. 11, 12, 19, 20, 21, 22). The respondents cite no support for this contention and none exists. In fact and in law, the September 21, 1979, proceeding was nothing more than a hearing on a motion. It was not in any sense a "trial."

Texas law makes a very clear distinction between trials and hearings. For example, Tex. R. Civ. P. 21, which specifically governs motions, expressly distinguishes between hearings and trials. Moreover, Tex. R. Civ. P. 248 specifically provides that hearings on motions should be held *before* trial. Trials, by contrast, are governed by Tex. R. Civ. P. 245-248. Those rules provide, *inter alia*, for trial assignments on at least ten (10) days notice (Rule 245), setting cases for trial on official records kept by the clerks of the courts (Rules 246, 247), and formal designations of trial dates (Rules 247, 248).

It is undisputed that the pleading filed by the Texas Attorney General on July 24, 1979, was a "*Motion for Entry of Final Judgment*". Hearings on that motion were scheduled for August 6, August 10, August 31 and finally September 21, 1979. No notice of trial was sent

by the Texas court; no trial date was ever set; and the case was never called for trial. (Pet. App. I, p. 80a).

Thus, the proceeding on September 21, 1979, was simply a hearing on the Attorney General's motion. Gregory never received a trial then or at any time in the Texas state courts; in fact, he has never received a trial at any time in any court. The respondents' unsupported assertion to the contrary is simply wrong.

REPLY POINT III

Gregory's Jury Demand Was Timely Under Texas Law

The respondents make the additional unsupported assertion that Gregory's jury demand was untimely under Texas law (Resp. Opp. pp. 11, 20). This contention also is erroneous as a matter of law.

Tex. R. Civ. P. 216 provides that a jury demand is timely if made ". . . a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance." Because no trial date had been set by the Texas state court, Gregory's jury demand was timely under Rule 216. Thus, Gregory was entitled under Texas law to a jury trial at least on the issue of his lack of consent to the alleged "settlement." See, e.g., *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951). Moreover, Gregory never waived his right to a jury trial, as the respondents contend. (Resp. Opp. p. 20). His counsel repeatedly objected to the Texas District Court receiving oral testimony and other evidence precisely because Gregory had demanded a trial by jury. (Pet. App. I, p. 80a, ¶5). See *Coleman v. Sadler*, 608 S.W.2d 344 (Tex. Civ. App.—Amarillo 1980) (no waiver where attorney objects to the court proceeding without a jury).

Gregory properly demanded, and was clearly entitled to, a jury trial under Texas law. Accordingly, no pre-

clusive effect should be given to the prior Texas state courts' rulings because Gregory's challenge to the consent judgment should have been decided by a jury, not a court. See *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 353-357 (7th Cir. 1987) (findings of fact and conclusions of law by District Court after a bench trial not entitled to preclusive effect where the District Court erroneously denied plaintiff his right to trial by jury on his claims under 42 U.S.C. § 1981). Under the unique facts of this case, neither 28 U.S.C. § 1738, nor Texas preclusion rules, require that Gregory be denied his day in court before a jury of his peers. Gregory should be afforded at least one full and fair opportunity to litigate his claims and prove to a jury that the respondents' unlawful conduct violated 42 U.S.C. § 1983.

CONCLUSION

For the reasons discussed above, and those in Gregory's original Petition, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

JAMES D. ST. CLAIR, P.C.*

THOMAS N. O'CONNOR

HALE AND DORR

60 State Street

Boston, MA 02109

(617) 742-9100

Attorneys for Petitioner,

Christopher Gregory

* Counsel of Record

July 17, 1987

APPENDIX

TEXAS RULES OF CIVIL PROCEDURE
CITED IN REPLY BRIEF

1. Tex. R. Civ. P. 21 provides:

Rule 21—Motions

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

2. Tex. R. Civ. P. 216 provides:

Rule 216—Fee

No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county courts, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

3. Tex. R. Civ. P. 245 provides:

Rule 245—Assignment of Cases for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ten days to the par-

ties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

4. Tex. R. Civ. P. 246 provides:

Rule 246—Clerk to Give Notice of Settings

The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

5. Tex. R. Civ. P. 247 provides:

Rule 247—Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

6. Tex. R. Civ. P. 248 provides:

Rule 248—Jury Cases

When a jury has been demanded, questions of law, motions, exceptions to pleadings, etc. shall, as far as practicable, be heard and determined by the court before the day designated for the trial, and jurors shall be summoned to appear in the day so designated.



